

STATE OF MICHIGAN  
IN THE SUPREME COURT

RONNIE DANCER and  
ANNETTE DANCER,

Plaintiffs-Appellees,

-vs-

Docket No. 153830  
COA Docket No.324314  
Kalamazoo Docket No. 12-0571-NO

CLARK CONSTRUCTION COMPANY, INC.  
a Michigan corporation, and BETTER BUILT  
CONSTRUCTION SERVICES, INC., a foreign  
Corporation,

Defendants-Appellants.

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**DEFENDANT CLARK CONSTRUCTION COMPANY INC.'S REPLY TO THE ANSWER  
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- Appendix 34 - Tom Destafney Deposition - attached to this brief.

This matter involves claimed liability against the defendant general contractors Clark Construction Company Inc. and Better Built Construction Services Inc. from a fall from hydro mobile scaffolding by plaintiff Ronnie Dancer (Dancer<sup>1</sup>). Plaintiffs' claims are based solely on the common work area doctrine. By the admission of plaintiffs' own expert, Dancer's fall was caused when he moved planking on the hydro mobile and failed to properly replace it before stepping on it. (See Clark's Application, pp 13-14, 27-29) The trial court properly granted defendants summary disposition given that Dancer created the risk he faced and was the only worker to face it, meaning none of the common work area doctrine elements exist. But plaintiffs convinced the Court of Appeal majority to reverse relying on supposed contractual requirements placed on defendants in their contract for the construction work. When this case is addressed under the proper standard actually set by Michigan law, it is clear that none of the elements of the common work area doctrine are met and that the Court of Appeals majority opinion must be reversed.

**THE COURT OF APPEAL MAJORITY IMPROPERLY IGNORED THE MIOSHA  
STANDARDS SET FOR THE INDUSTRY**

In order to avoid the fact that Dancer created the danger he face himself by moving planking and then walking on it without fall protection, plaintiffs contend that the entire system used for setting up the hydro mobile was faulty because the planking was not secured and special bridges were not used. (Response, p 36) The Court of Appeals majority relied on this in finding a high degree of risk to a significant number of workers. (Majority Opinion, Appendix 1, p 7) In making this argument, plaintiffs have made every effort to ardently avoid the actual MIOSHA standards for scaffolding planking. The Court of Appeals majority also failed to address the actual industry standards. The MIOSHA standard for planking and scaffolding platforms contained in Part 12 Scaffolds and Scaffold Platforms of the Construction Safety Standards specifically states: "where 16-foot planks are used as prescribed in subrule

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<sup>1</sup> Dancer's wife, plaintiff Annette Dancer (Annette), brings a derivative claim in this matter. Dancer and

(7) of this rule, *tie downs are not required unless wind uplift may occur.*” R408.41217(5)(c), emphasis added. Subrule (7), in turn, provides: “Where planks are lapped, each plank shall lap its bearer not less than 6 inches, which will provide a minimum overlap of 12 inches.” R408.41217(7). *Plaintiffs fail to even cite to this MIOSHA regulation to this Court.* But the evidence demonstrates that the planking used in this case was 16-foot planks that lapped over each other. (Martin Deposition, Appendix 12, pp 47-48, 90; Johnson Deposition, Appendix 10, p 73-76, 95) Under the circumstances, the industry standards to provide a safe working environment were met. Plaintiffs complain that “overlapping alone across the gaps was not sufficient to prevent the planks from shifting or flipping”. (Response, p 38) Plaintiffs also claim that additional outrigger supports should be required. (Response, p 38) Plaintiffs’ arguments should be taken up with MIOSHA. MIOSHA has determined what is sufficiently safe for workers in our state. It is not the providence of the plaintiffs or the Court of Appeals majority to reject these standards and to create new industry standards on a piecemeal basis. “In construing administrative rules, courts apply principles of statutory construction.” *Detroit Base Coalition for Human Rights of Handicapped v Director, Dep’t of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988). The primary rule of statutory construction is to apply the statute as written. *Roberst v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). “Judicial construction of an unambiguous statute is neither required nor permitted.” *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010). As written, the special bridges and tie downs demanded by plaintiffs were not required by MIOSHA. And the failure to provide them cannot possibly be an unreasonably dangerous condition that defendants were required to alleviate.

The actual danger at issue in this case was not the failure to tie down the planking, which was not even required in the industry and which the Liedal & Hart safety director indicated could create greater

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Annette will be referred to collectively as plaintiffs when appropriate.

danger by creating trip hazards. (Kyewski Deposition, Appendix 9, pp 5-6, 8, 54<sup>2</sup>) The actual danger at issue in this case is Dancer's failure to wear fall protection and to move planking back into position so that it safely rested on an outrigger. Plaintiffs argue that whether Dancer moved the planking was a question of fact relying on the fact that he normally did not do so. (Response, p 34) This argument is specious given that Dancer admits that he has no actual memory of the events and that every other witness specifically testified that Dancer moved the planks. Nick Martin specially instructed Dancer to move the scaffolding. (Appendix 12, pp 29-30) The only eye witness to the fall, Glenn Johnson, repeatedly testified that Dancer moved the planking and failed to put it back correctly, leading to the fall. (Appendix 10, pp 29-30, 33-34, 38, 49-50, 63-64<sup>3</sup>) Plaintiffs' attempt to recreate the actual danger at issue in this matter is especially spurious in light of plaintiffs' expert testimony explicitly stating that the accident occurred because of how "Ronnie Dancer laid down the boards that morning. . ." of which the expert specifically drew a diagram. (Clark Application, pp 12-13, 27-28; Wright Deposition, Appendix 19, p 89) Plaintiffs' expert conceded that this risk was not the same as properly laid planking that overlapped the outriggers because the properly laid planking would not flip. (Appendix 19, pp 90-98) In fact, when shown a picture of the planking set up overlapping as usual, plaintiffs' expert stated that that was not the danger but that the moved improper supported planking shown in his diagram was the damager: "But if you reverse it like I'm showing in Exhibit 12, *that's the danger*." (Appendix 19, p 93,

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<sup>2</sup> Plaintiffs attack Kyewski's testimony regarding the trip hazard by claiming that he conceded that planking was required to be secured. (Response, p 11) Kyewski made no such concession. Instead, he was read a supposed provision of a document and indicated that its application was unclear because installing multiple tie downs would create trip hazards and because they had never done so in the past and had never been cited for not doing so. (Appendix 9, pp 53-55)

<sup>3</sup> Plaintiffs attempt to argue that Johnson only assumed that the planks were moved. (Response, p 35) In fact, Johnson only assumed why Dancer moved the planks: "So I assume Ronnie was moving some of the plank up to bring the safety rails inward as they were going up, so." (Appendix 10, p 23) Johnson's actual testimony was that he specifically saw that the planking was moved and knew that Dancer had moved the planking as Dancer was the only person on the hydro mobile to move the planking. (Appendix 10, pp 29-30, 38, 49, 64) There is absolutely no hesitation or equivocation in Johnson's

emphasis added<sup>4</sup>) Plaintiffs misled the Court of Appeals majority regarding the actual danger at issue and attempt to do so to this Court as well by failing to provide the testimony of their own expert and by failing to cite the MIOSHA standards.<sup>5</sup> This Court should not allow this to stand.

When the actual danger identified by plaintiffs' own expert is considered, it becomes clear that none of the elements of the common work area doctrine exist. First, there is no possible way that defendants failed to "take reasonable steps within [their] supervisory and coordinating authority." *Ormsby v Capital Welding Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).<sup>6</sup> The danger in Dancer improperly placing the planking back down so that it was not resting on the outrigger existed for only a few minutes at best on a rainy day when others were being sent home from the site. (Appendix 12, pp 25-27, 40-42, 11, 110-111; 124, 167-127) Moreover, plaintiffs admit that a safety program was in place, albeit while

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testimony. He saw that Dancer created the risk.

<sup>4</sup> Plaintiffs claim that this testimony from their expert should be ignored because the expert concluded that Dancer was "innocent." (Response, p 20-21 n19) Wright opined that Dancer was not at fault because Dancer supposedly did not have the skill and training to move the planking. (Appendix 19, pp 86, 100) (A conclusion that seems highly questionable given that plaintiffs admit that Dancer received a scaffold certification. (Response, p 19 n 16)) Wright never stated that Dancer was "innocent" of moving the planking. Instead, he conceded that this was how the accident occurred. (Appendix 19, 89-98) Moreover, Dancer himself twice admitted to moving the planking to Nick Martin and Brad Leidal. (Liedal Deposition, Appendix 7, p 35; Appendix 12, pp 34-35) Plaintiffs try to negate these admissions by claiming that Dancer now has no memory of the events and believes he did not speak after the fall. (Response, p 22 n22) But the fact that Dancer does not remember making the admissions and now wishes that he had not does not negate the testimony of the witnesses specially hearing the admissions, which are directly consistent with plaintiffs' own expert's testimony on the subject.

<sup>5</sup> Plaintiffs also claim that the testimony of Tom Destafney supports their claim that special bridges had to be used instead of planking across the gaps as allowed by MIOSHA. (Response, p 10) In fact, Destafney testified that this requirement was not contained in EM 385 or the manuals for the hydro mobile and that the use of the special bridge would not have changed the risk at issue as the planks on the bridge would still have to be moved for the obstacles on the walls that Dancer was avoiding. (Destafney Deposition, Appendix 34, pp 46-47, 74, 80, 92-93)

<sup>6</sup> Plaintiffs claim that defendants "conceded" the first element. (Response, p 41) Plaintiffs' citation to the record is misleading. All that the defendant conceded was that they were general contractors on the project with corresponding supervisory authority. (Summary Disposition Motion Transcript, Appendix 22, pp 27) There has been no concession of the reasonable steps portion of the element.

making several ad hominem attacks against some of the individuals involved in it.<sup>7</sup> This safety program, indisputably resulted in a safety harness being available to Dancer to use when he was moving the planking. (Stewart Deposition, Appendix 13, pp 22-23, 25<sup>8</sup>) Under the circumstances, the first element cannot be satisfied. The second element of “to guard against readily observable and avoidable dangers” also could not be satisfied. *Ormsby*, 471 Mich at 57. “Readily observable” is equivalent to “open and obvious.” *Ghaffari v Turner Constr Co*, 473 Mich 16, 22; 699 NW2d 687 (2005). Open and obvious requires that it be visible on casual inspection. *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). But plaintiffs now concede “Glenn Johnson specifically testifies that, at the time Mr. Dancer fell, there was no obvious opening in the unsecured overlapped planks that flipped up.” (Response, p 35)

<sup>7</sup> Many of the attacks are misplaced and misleading to the Court. For instance, plaintiffs claim that Tom Destafney testified that Corey Hanson of Better Built was not qualified. But Destafney testified that, while Hanson may not have checked some boxes on paper “It doesn’t mean he necessarily couldn’t fulfill the role and do the job. . . .” (Appendix 34, p 34) Destafney also testified that the Army would have known of Hanson and approved of him for the project. (Appendix 34, p 34)

<sup>8</sup> Plaintiffs claim that there was no discernable point for Dancer to tie off the safety harness. (Response, p 21 n20) Again, plaintiffs’ citations to the record are misleading. ***Johnson actually testified that they “anchored in numerous different spots”***. (Appendix 10, p 126) Plaintiffs’ expert Wright testified that he did not know if the tie off locations existed based on the existing record. (Appendix 19, p 103-105) Laura Wojcik also stated that she just did not know where the specific anchor point was located. (Wojcik Deposition, Appendix 31, p 41) Stewart, who inspected the hydro mobile after the incident, specifically testified that “there were fall protection tie off points available on the scaffolding.” (Appendix 13, p 25) Thus, the actual evidence from Johnson is that there would be several points at which Dancer could have and should have tied off while the planking was out of place. Plaintiffs also contend that Dancer was not required to wear fall protection because guardrails were in place and that, if Dancer was required to wear fall protection, fall protection was not enforced because others were on the scaffolding without it at other times. (Response, pp 39-40) Again, this is specious logic not supported by the record. John Stewart from MIOSHA testified that, when the planking on the scaffolding was properly placed, no further fall protection was required. But when planking was moved as indisputably occurred in this case by Dancer, fall protection would be required because there was an opening in the protection system not guarded by the guard rails. (Appendix 13, pp 43-44, 46) Simply, Dancer had to wear the fall protection device until he moved the planking back into place correctly, which he never did. His decision not to wear the fall protection offered to him is the cause of the incident and cannot be blamed on defendants as Dancer had the option to protect himself on the hydro mobile. (Appendix 13, pp 22-23, 25) Plaintiffs also attempt to claim Jim Schaibly testified that Corey Hanson’s failure to enforce safety was a cause of Dancer’s injury. (Response, pp 22, 37) Schaibly actually testified that, had Dancer worn the fall protection provided to him, it would have prevented the fall. (Schaibly Deposition, Appendix 17, pp 119-120)

This concession is a concession that the actual danger at issue, the misaligned planking moved by Dancer, could not be seen on causal inspection. This should end the case.<sup>9</sup> For the third element, a high degree of risk to a significant number of workers, Dancer was alone on the scaffolding at the time he created the risk of the misaligned planking and the planking fell to the ground so that no other worker would ever face the same risk. (Appendix 7, p 35; Appendix 10, pp 12, 24, 28; Appendix 12, pp 29-30, 47; Appendix 13, p 27; Appendix 17, p 111<sup>10</sup>) Dancer alone cannot possibly be a significant number of workers. *Alderman v JC Dev Cmtys, LLC*, 486 Mich 906; 780 NW2d 840 (2010). For the same reasons, the common work area element also cannot be satisfied. Dancer faced the risk actually at issue in this case alone, without any other contractors facing the same risk. (Appendix 7, p 35; Appendix 10, pp 12, 24, 28; Appendix 12, pp 29-30, 47; Appendix 13, p 27; Appendix 17, p 111) One contractor working alone cannot be a common work area. *Ormsby*, 471 Mich 57-58 n9. It was plaintiffs burden to prove every single one of the common work area doctrine elements. *Id.* at 59 n11. Because the trial court properly concluded that plaintiffs could not do so, the Court of Appeals majority reversing that decision should itself be reversed.

**PLAINTIFFS' CASE AND THE COURT OF APPEALS MAJORITY OPINION IS BASED ENTIRELY ON THE SUPPOSED CONTRACTUAL REQUIREMENTS OF EM 385 WHICH ARE NOT RELEVANT TO THE COMMON WORK AREA DOCTRINE**

<sup>9</sup> Plaintiffs attempt to argue that the lack of visible opening must mean that Dancer did not create the risk. (Response, p 20 n19) The exact opposite is true. The risk described by all of the witnesses and plaintiffs' expert could not have existed prior to Dancer moving the planking because it would have been physically impossible for others to have walked on the unsupported planking without falling as all of the witnesses indicated that they did. (Clark Application, pp 15, 32)

<sup>10</sup> Plaintiffs attempt to rely on the testimony of Eric Koshurin to negate the testimony that Dancer was alone at the time of the fall. (Response, p 44) Koshurin testified that he was "pretty sure" that there were other labors up there. But he admitted that this was not at the time of the fall as he could not see the hydro mobile as he was working on the other side of a wall doing underground piping. (Koshurin Deposition, Appendix 16, p 73) As explained by Johnson, the only actual eye witnesses, and the other witnesses, Koshurin saw other workers on the scaffolding earlier in the day before they were sent home and before Dancer went back up alone on the hydro mobile to move it. (Appendix 7, p 35; Appendix 10, pp 12-14, 24, 19-21, 38; Appendix 12, pp 26-27, 29-30, 47, 111; Appendix 13, p 27; Appendix 17, p 111) Plaintiffs' mischaracterization of the record is to no avail when the entire testimony is reviewed.

Plaintiffs have conceded throughout this brief that their case, and thus, the Court of Appeals majority opinion, is based entirely on application of their reading of the contractual requirements of EM 385<sup>11</sup>. Plaintiffs concede that these alleged contractual/manual requirements are “more stringent” than the industry standards discussed above imposed by MIOSHA. (Response, p 49) Taken on its face, the concession is fairly remarkable as it means that, *on any other worksite but this one*, the condition of the hydro mobile scaffolding would have been reasonably safe without the planking being tied down pursuant to the applicable MIOSHA standards, but it was supposedly not reasonably safe on this site because of the supposed contractual agreement entered by defendants and because of the contents of some manual. *The common work areas doctrine has never been applied in such a selective manner* and such a selective application is inconsistent with this Court’s intention of creating general standards of safety for the construction industry as discussed in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974). Moreover, such a system could never satisfy the elements of the common work area doctrine as a danger that could only be discerned after reading and interpreting a voluminous contracts and then reading every manual for every piece of equipment on the worksite could never be discovered on causal inspection as required to be readily observable. *Ormsby*, 471 Mich at 57; *Ghaffari*, 473 Mich at 22; *Hoffner*, 492 Mich at 461. Under the circumstances, the Court of Appeals majority opinion relying on plaintiffs’ recreation of the common work area doctrine to create a different standard of safety on every work site should be reversed.

This is especially true given that plaintiffs have no right to enforce the contractual requirements

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<sup>11</sup> In fact, plaintiffs contend that the actual requirements supporting their arguments regarding the problems with the planking are not really contained in EM 385 but instead rely on EM 385’s reference to manuals, which plaintiffs contend point them to a manual for the hydro mobile stating that states “[a]ny use of one or several Hydro Mobile motorized units, with or without accessories, in such a configuration or manner as not explicitly described in this manual is not recommended without the prior written permission of Hydro Mobile Inc.” Plaintiffs interpret this to somehow eliminate the possibility of using planking as allowed by MIOSHA standards despite the fact that it does not even mention planking.

contained in defendants' contract. Plaintiffs have conceded that they cannot make a third-party beneficiary claim to enforce the contract. (Response, pp 32-33) Therefore, in order for plaintiffs to claim a right to enforce the terms of the contract in a tort action as third parties to that contract, pursuant to *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004) and *Loweke v Ann Arbor Ceiling & Partitions Co LLC*, 489 Mich 157; 809 NW2d 553 (2011), they would have to show a duty to meet the terms of contract separate and distinct from the contract. Plaintiffs only argument in light of *Fultz* is that the separate and distinct duty is created by the common work area doctrine. (Response, pp 32-33) But the common work area doctrine does not create a duty to comply with a contract. In fact, *plaintiffs concede as much by conceding that EM 385 sets a "more stringent requirement" than what would otherwise exist*. (Response, p 49) Thus, by this concession, the common law duty to provide a safe working environment is not equivalent to plaintiffs' claimed standards supposedly set by contract in EM 385 and the accompanying manuals. EM 385 is irrelevant to the case at hand.<sup>12</sup> Simply put, the contents of a contractual safety program are not one of the elements of the common work area doctrine. *Ormsby*,

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(Response, pp 9-10)

<sup>12</sup> Plaintiffs cite to *Plummer v Bechtel Const Co*, 440 Mich 646; 489 NW2d 66 (1992) to claim that EM 385 is relevant to this case. (Response, p 32, n28) *Plummer* says nothing of the sort. The safety program in that case is referenced to determine whether there was retained control. *Id.* at 659. Nowhere in that case did the Court conclude that a third-party employee could enforce the terms of that safety program or that the safety program somehow became an element of the common work area doctrine. The same is true of *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals issued February 4, 2014 (Docket Nos. 312141, 313606) (Appendix 32) and *Rihani v Greeley & Hansen of Mich LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket Nos. 256921, 256941) (Appendix 33) (Response, p 32 n28). In those cases, the safety program was cited to determine who was in control of the project. They were not used to create a "more stringent" safety standard than what would otherwise exist on the project as plaintiffs admit they have done in this case by applying EM 385. Plaintiffs attempt to assert that the cases cited by Clark demonstrating that a worker cannot claim a third party beneficiary status to change the common work area doctrine by adding in terms of the contract to the common work area doctrine are irrelevant. (Response, p 32 n28) Far from being irrelevant, the cases, and plaintiffs' cited cases show that the Court of Appeals is regularly presented with site safety programs and contracts but have never read the requirements of those contracts into the common work area doctrine as the plaintiffs and the Court of Appeals majority have done in this case. (Response, p 49)

471 Mich at 57. The Court of Appeals majority erred in concluding otherwise.

**DANCER AND KOSHURIN DID NOT FACE THE SAME RISK**

Plaintiffs argue that the focus of the Court should be on the failure to securing of the planking because of the testimony of Koshurin. Plaintiffs question why Koshurin “nearly fell” two weeks earlier if Dancer created a new risk leading to his fall. (Response, p 34) The fact is that Koshurin did not “nearly fall” as he testified that the board he was standing on moved, but “landed on something solid.” (Appendix 16, p 18) What Koshurin faced was a risk inherent to the use of the hydro mobile. There will likely be some movement of the planking some times. But this does not mean that the system is unsafe. To the contrary, MIOSHA has determined that such a system is the appropriate means of setting up the hydro mobile. R408.41217(5)(c). In fact, Stewart saw how the planking was used to connect the hydro mobile to each other but did not find any MIOSHA violations in the way the hydro mobile was set up. (Appendix 13, pp 4, 13, 28, 40) There is some inherent risk in the use of scaffolding that cannot be eliminated, but “general contractors simply cannot remove all potential hazards from a construction workplace. . . .” *Latham v Barton Malow Co*, 480 Mich 105, 113-114; 746 NW2d 868 (2008). Given that the hydro mobile met MIOSHA standards as described by Koshurin, he did not face the same risk as Dancer. Dancer faced a completely different risk in not wearing his fall protection while he created an opening in the hydro mobile system. There is no evidence of anyone else ever facing this risk. (Clark Application, pp 24-31) This means that the trial court property granted summary disposition.

**LEIDAL & HART CONTROLLED THE SCAFFOLDING AND WAS USING IT IN ISOLATION AT THE TIME OF THE INCIDENT**

This is not even the type of case that the common work area doctrine is supposed to apply to as the hydro mobile scaffolding was always under the control of one subcontractor, Leidal & Hart, who other subcontractors had to seek permission from to use the hydro mobile. (Appendix 12, p 118) To combat this fact, plaintiffs claim that Koshurin testified that Corey Hanson, who worked for Better Built, authorized Koshurin’s use of the scaffolding. (Response, p 30) This is amisleading citation as Koshurin

went on to testify that it was Nick Martin of Leidal & Hart that told the electricians that they could actually go on the scaffolding. (Appendix 16, pp 45-46) Thus, there is no contrary testimony to the fact that Leidal & Hart *was in complete control of the hydro mobile scaffolding*.

This is especially true at the time of the fall as it is undisputed that Leidal & Hart were working in isolation on the hydro mobile and not with other contractors. In response to Clark's application for leave to appeal, plaintiffs conceded that "for about a week, employees of one subcontractor (Dancer's employer, Liedal & Hart) used the scaffold after it had been raised above 20-25 feet." (Response Brief, p ix) Thus, this case involves one contractor working in isolation. All that plaintiffs can point at to counter this is the fact that the hydro mobile may have been moved after the fact and that others would have potentially used it at lower heights at the different locations. (Response, p 48) Given that plaintiffs admit that the hydro mobile would change condition and location before ever being used again by another contractor, it cannot possibly be a common work area. Plaintiffs want this Court to rule, as did the Court of Appeals majority, that, once a scaffolding is used by more than one subcontractor, it is forevermore a common work area on the project no matter if use by other contractor ends *or even if it is moved to a different location*. There is no support for such a position, and it is contrary to existing authority on the issue. (Clark Application, pp 39-41) The Court of Appeals majority conclusion otherwise is an inappropriate move towards strict liability for general contractors on projects where scaffolding is used.

#### PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Laurie Wilhite

Legal Assistant, Harvey Kruse, PC

DATED: August 26, 2016

Respectfully submitted,  
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**EXHIBIT 31**

Laura Wojcik  
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<p>STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO</p> <p>RONNIE DANCER and ANNETTE DANCER, Plaintiffs, -vs- Case No. 2012 0571 NO CLARK CONSTRUCTION COMPANY, INC., a Michigan corporation, and BETTER BUILT CONSTRUCTION SERVICES, INC., a foreign corporation, Defendants.</p> <hr/> <p>DEPONENT: LAURA WOJCIK</p> <p>DATE: Tuesday, July 29, 2014</p> <p>TIME: 10:00 a.m.</p> <p>LOCATION: 106 North Fourth Street, Suite 100 Ann Arbor, Michigan</p> <p>REPORTER: Diana L. LaMilza, CSR-5085</p> <p>APPEARANCES: MR. BRIAN J. BENNER Benner &amp; Foran, P.C. 28116 Orchard Lake Road Farmington Hills, Michigan 48334 248-737-5544 Appearing on behalf of the Plaintiffs. MR. LARRY W. DAVIDSON Harvey Kruse, P.C. 1050 Wilshire Drive, Suite 320 Troy, Michigan 48064 248-649-7800 Appearing on behalf of the Defendant Clark.</p>	<p>1 INDEX</p> <p>2</p> <p>3 WITNESS: PAGE</p> <p>4 LAURA WOJCIK</p> <p>5 EXAMINATION BY MR. BENNER 5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10 EXHIBITS</p> <p>11</p> <p>12 NUMBER PAGE</p> <p>13 Exhibit No. 1 (Notice of Deposition) 4</p> <p>14 Exhibit No. 2 (Curriculum Vitae) 5</p> <p>15 Exhibit No. 3 (List of Materials) 5</p> <p>16 Exhibit No. 4 (Typed summaries) 6</p> <p>17 Exhibit No. 5 (E-385 and OSHA Documents) 8</p> <p>18 Exhibit No. 6 (Report) 8</p> <p>19 Exhibit No. 7 (Cover Letter) 9</p> <p>20 Exhibit No. 8 (Photo cover sheet) 9</p> <p>21 Exhibit No. 9 (Invoices) 9</p> <p>22 Exhibit No. 10 (Testimony List) 14</p> <p>23 Exhibit No. 11 (Picture) 23</p> <p>24</p> <p>25</p>
<p>Page 2</p> <p>1 APPEARANCES: (Continued)</p> <p>2 MR. RON W. KIMBREL</p> <p>3 Lennon, Miller, O'Connor, &amp; Bartosiewicz, PLC</p> <p>4 900 Comerica Building</p> <p>5 Kalamazoo, Michigan 49007</p> <p>6 269-381-8844</p> <p>7 Appearing on behalf of the Defendant</p> <p>8 Better Built.</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 4</p> <p>1 Ann Arbor, Michigan</p> <p>2 Tuesday, July 29, 2014</p> <p>3</p> <p>4 * * *</p> <p>5</p> <p>6 LAURA WOJCIK</p> <p>7 was thereupon called as a witness herein, and after having</p> <p>8 been first duly sworn to tell the truth, the whole truth,</p> <p>9 and nothing but the truth, was examined and testified as</p> <p>10 follows:</p> <p>11 (Exhibit No. 1 (Notice of Deposition) marked</p> <p>12 for identification.)</p> <p>13 MR. BENNER: This is the discovery deposition</p> <p>14 of Laura Wojcik being taken pursuant to notice.</p> <p>15 My name, as you know, is Brian Benner. I</p> <p>16 represent Ronnie and Annette Dancer. I'm going to be</p> <p>17 asking you a series of questions. If you don't</p> <p>18 understand one of the questions, would you please tell</p> <p>19 me?</p> <p>20 THE WITNESS: Yes.</p> <p>21 MR. BENNER: I will then rephrase the</p> <p>22 question. If you answer the question, we all shall</p> <p>23 assume you understood the meaning of the question.</p> <p>24 All right?</p> <p>25 THE WITNESS: Yes.</p>

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<p style="text-align: right;">Page 5</p> <p>1 MR. BENNER: You agree that that's fair?</p> <p>2 THE WITNESS: Yes.</p> <p>3 EXAMINATION</p> <p>4 BY MR. BENNER:</p> <p>5 Q. Would you please state your name for the record.</p> <p>6 A. It's Laurie Wojcik.</p> <p>7 Q. And your business address is?</p> <p>8 A. 2531 Jackson Avenue, Suite 349, Ann Arbor, Michigan,</p> <p>9 48103.</p> <p>10 Q. Did you bring your curriculum vitae with you?</p> <p>11 A. Yes.</p> <p>12 (Exhibit No. 2 (Curriculum Vitae) marked for</p> <p>13 identification.)</p> <p>14 Q. I'm going to show you what's been marked as Exhibit</p> <p>15 No. 2, and if you could just identify it for me and</p> <p>16 how many pages?</p> <p>17 A. This is a current copy of my CV, and it's seven pages</p> <p>18 long.</p> <p>19 Q. Did you bring what you reviewed for today's</p> <p>20 deposition?</p> <p>21 A. Yes, I did. I have a list and then everything is on</p> <p>22 the thumb drive.</p> <p>23 (Exhibit No. 3 (List of Materials) marked for</p> <p>24 identification.)</p> <p>25 Q. Let me show you what's been marked as Exhibit No. 3.</p>	<p style="text-align: right;">Page 7</p> <p>1 harness that I sent to Mr. Kimbrel, and then as you</p> <p>2 requested, copies of my journal articles. And so</p> <p>3 that's on the drive as well.</p> <p>4 Q. But you don't have copies, it's just on the drive?</p> <p>5 A. It's just on the drive.</p> <p>6 Q. Tell me what's on the drive again.</p> <p>7 A. This includes everything that I have received, copies</p> <p>8 of all of those summaries, correspondence, additional</p> <p>9 notes, additional materials I looked at, invoices, and</p> <p>10 then copy of my testimony list for the last four years</p> <p>11 and my CV. And the articles -- I don't remember if I</p> <p>12 said that.</p> <p>13 Q. So you got correspondence, additional notes, and then</p> <p>14 what else did you say is on there?</p> <p>15 A. Some additional file materials I downloaded.</p> <p>16 Q. What additional file materials would that be?</p> <p>17 A. Those actually I do have copies of. So this was -- I</p> <p>18 have a paper that I found that summarized a lot of the</p> <p>19 safety literature about fall arrest harnesses, and</p> <p>20 then I downloaded a copy of the 385-1-1 manual and</p> <p>21 some documents from OSHA. So those I have in hard</p> <p>22 copy. On the disc I just have some stuff on line from</p> <p>23 when I was buying the exemplar harness, the</p> <p>24 description of the harness and my receipt and things</p> <p>25 like that, but I didn't print those.</p>
<p style="text-align: right;">Page 6</p> <p>1 Can you just identify it?</p> <p>2 A. This is the list of all the file materials that I</p> <p>3 received from Mr. Kimbrel's office.</p> <p>4 Q. And in preparation for today's deposition did you</p> <p>5 speak with anyone besides your attorney Mr. Kimbrel?</p> <p>6 A. I have spoken with him and with Mr. Davidson.</p> <p>7 Q. When did you speak with Mr. Davidson?</p> <p>8 A. We had a meeting a couple weeks ago with the three of</p> <p>9 us.</p> <p>10 Q. Where did that take place?</p> <p>11 A. Here in Ann Arbor.</p> <p>12 Q. Let me ask you, did you generate any reports or</p> <p>13 summaries?</p> <p>14 A. I do have summaries.</p> <p>15 (Exhibit No. 4 (Typed summaries) marked for</p> <p>16 identification.)</p> <p>17 Q. I'm going to hand you Exhibit No. 4, can you identify</p> <p>18 it and tell me how many pages it consists of?</p> <p>19 A. I don't have an exact page count, but this consists of</p> <p>20 my typed summaries of all the depositions I received.</p> <p>21 Q. What else did you bring with you today?</p> <p>22 A. I have some additional materials that I downloaded on</p> <p>23 line for my analysis of the case. I also have</p> <p>24 invoices and correspondence and additional notes. I</p> <p>25 have some photographs I took of an exemplar safety</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Can I see the documents?</p> <p>2 A. And I have the full copy of the 385 manual but I</p> <p>3 didn't print the whole thing.</p> <p>4 (Exhibit No. 5 (E-385 and OSHA Documents)</p> <p>5 marked for identification.)</p> <p>6 Q. Can you just identify Exhibit No. 5 and if you can</p> <p>7 tell me how many pages it consists of?</p> <p>8 A. I'm not sure how many pages this is. This is some</p> <p>9 selected pages from the 385 manual and some selected</p> <p>10 OSHA documents.</p> <p>11 (Exhibit No. 6 (Report) marked for</p> <p>12 identification.)</p> <p>13 Q. And I'm going to show you Exhibit No. 6 and if you</p> <p>14 could identify that?</p> <p>15 A. This is a paper called -- or a report called</p> <p>16 Survivable Impact Forces on Human Body Constrained by</p> <p>17 Full Body Harness. And this was a summary paper</p> <p>18 describing a lot of the safety literature about full</p> <p>19 body safety harnesses.</p> <p>20 Q. So you told me there is correspondence, additional</p> <p>21 notes, file materials, some of which you gave to me.</p> <p>22 What else have you got?</p> <p>23 A. Here are copies of the correspondence and additional</p> <p>24 notes page.</p> <p>25 Q. Do these two go together or they are separate?</p>

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<p style="text-align: right;">Page 9</p> <p>1 A. There are separate files. 2 (Exhibit No. 7 (Cover Letter) marked for 3 identification.) 4 (Exhibit No. 8 (Photo cover sheet) marked for 5 identification.) 6 Q. Let me hand you Exhibit No. 7 and if you could 7 identify it, please. 8 A. This is a copy of the cover letter that I sent to 9 Mr. Kimbrel when I opened the project. 10 Q. Is there additional correspondence that is on -- some 11 place else? 12 A. No. 13 Q. That's the only correspondence between you and 14 Mr. Kimbrel? 15 A. That was the only actual letter. Anything else was 16 just sort of a cover Email saying here are these -- 17 here are some depositions or here's a report, but I 18 didn't save those. 19 Q. And then let me show you Exhibit No. 8 and if you can 20 identify that and tell me what it is? 21 A. This was the photo cover sheet that I used when I took 22 pictures of the exemplar safety harness. 23 Q. Do you have anything else you brought with you? 24 A. I have invoices. 25 (Exhibit No. 9 (Invoices) marked for</p>	<p style="text-align: right;">Page 11</p> <p>1 Q. Do you expect to do more work after today's 2 deposition? 3 A. Only if I'm asked to. 4 Q. Thanks for adding that up for me. 5 Did you bring any of your articles that would 6 be relevant to this matter? 7 A. I brought copies of all of my journal articles and 8 those are on the USB drive. 9 Q. What would they be, all your articles you have ever 10 written? 11 A. All of the actual journal articles, yes. 12 Q. When you say journal articles what do you mean by 13 that? 14 A. Those are articles, papers that have gone through the 15 peer review process and are in archival journals that 16 you can search for on MedLine or one of the 17 engineering databases and find those. 18 Q. Have you authored any notes or reports regarding this 19 case? 20 A. Not other than what you have here. 21 Q. Have you written any construction journal articles or 22 any other articles that would deal with Hydro Mobile 23 scaffolding? 24 A. No. 25 Q. Have you written any articles on construction falls?</p>
<p style="text-align: right;">Page 10</p> <p>1 identification.) 2 Q. And let me show you Exhibit No. 9, if you could tell 3 me what that is? 4 A. This is the collection of my invoices to date for this 5 project. 6 Q. And what would be the total that you billed so far? 7 A. I don't know. Well, I would have to add them all up. 8 Q. Can you give me a ball park? 9 A. No, I didn't look at that. Does someone have a 10 calculator? 11 Q. I just want a ball park. You can use your phone, 12 whatever you want to use, that's fine with me. 13 MR. DAVIDSON: Let me just object to the 14 question. You have the invoices. It's simple 15 mathematics to add them up. I don't think it's a 16 proper question for this witness. 17 MR. BENNER: You don't think she can add or 18 what's the problem? Larry, you are just too serious 19 all the time. 20 A. Total billings are approximately 13 thousand dollars 21 so far. 22 Q. Do you expect to bill more? Do you have more that you 23 haven't billed to date? 24 A. I have preparation time for this deposition and the 25 deposition time today.</p>	<p style="text-align: right;">Page 12</p> <p>1 A. I have written articles about falls and balance and 2 muscle fatigue and things like that. And for at least 3 some of the projects, part of the rationale for doing 4 them was because of occupational falls. 5 Q. Can you please look at your curriculum vitae and point 6 out which articles that you have written relative to 7 falls that would be pertinent to this matter? 8 A. Actually quite a few of the publications do have to do 9 with falls and balance control. That was my main area 10 as a graduate student was human motor control and 11 balance. So whether you look at it saying is it 12 purely a geriatric question about trying to prevent 13 falls in the community versus falls in industry, they 14 all kind of get lumped together. 15 Q. Okay. And could you just point out which ones we're 16 talking about, would that be possible? 17 A. It's probably easier to tell you which are not related 18 to balance and falls. 19 Q. Okay. 20 A. So if you look through the publications part, so 21 starting on page two, the ones that do not have to do 22 with falls and balance are number five, number seven, 23 number eight, number nine, number 12, 14, 15, and 24 that's it. 25 Q. Have you ever testified for Mr. Kimbrel or anybody</p>

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<p style="text-align: right;">Page 13</p> <p>1 from his firm before?</p> <p>2 A. I have worked for him before; I can't recall if I've</p> <p>3 actually testified on any of the cases.</p> <p>4 Q. What kind of case was that?</p> <p>5 A. There was one quite a few years ago that involved</p> <p>6 someone who got her hair caught in the wheels of a</p> <p>7 go-cart, and I think that one might have gone to</p> <p>8 deposition. But I think that's the only one.</p> <p>9 Q. Have you worked for anybody else in his law firm?</p> <p>10 A. Yes.</p> <p>11 Q. And who would that be?</p> <p>12 A. Mr. Ty Cudney.</p> <p>13 Q. And what kind of case for him?</p> <p>14 A. I think it was a motor vehicle accident.</p> <p>15 Q. When was that?</p> <p>16 A. A few years ago.</p> <p>17 Q. Anybody else from the firm?</p> <p>18 A. I don't think so.</p> <p>19 Q. Do you know how they got a hold of you initially?</p> <p>20 A. I don't remember what the initial referral was.</p> <p>21 Q. How many times have you testified in depositions?</p> <p>22 A. I've got a combined list for deposition and trials. I</p> <p>23 don't have it broken out.</p> <p>24 Q. Great.</p> <p>25 A. This is for the last four years.</p>	<p style="text-align: right;">Page 15</p> <p>1 A. Probably.</p> <p>2 Q. 95 percent?</p> <p>3 A. I don't think it's that high.</p> <p>4 Q. Somewhere between 90 and 95?</p> <p>5 A. It's just a ball park. It depends on the year. So</p> <p>6 roughly if you look over my whole career it's been</p> <p>7 about 90 percent.</p> <p>8 Q. Have you ever testified on behalf of Mr. Davidson?</p> <p>9 A. No.</p> <p>10 Q. Have you ever testified for anybody from his firm?</p> <p>11 A. Not that I can recall off the top of my head.</p> <p>12 Q. Do you know how -- looking at Exhibit No. 3 -- how the</p> <p>13 material was selected for you to review?</p> <p>14 A. No.</p> <p>15 Q. Did you look at any of the pictures of the work site?</p> <p>16 A. Yes, things that were included in the exhibits or in</p> <p>17 the reports.</p> <p>18 Q. Did you review the Hydro Mobile manual?</p> <p>19 A. I think I glanced through it, again the pages that</p> <p>20 were attached as exhibits.</p> <p>21 Q. Did you look at the operator's manual and the owner's</p> <p>22 manual for the Hydro Mobile?</p> <p>23 A. Whatever was attached. I remember I looked through</p> <p>24 some of the Hydro Mobile documents.</p> <p>25 Q. Did you go on the Hydro Mobile website?</p>
<p style="text-align: right;">Page 14</p> <p>1 (Exhibit No. 10 (Testimony List) marked for</p> <p>2 identification.)</p> <p>3 Q. I'm going to hand you Exhibit No. 10 and ask you to</p> <p>4 identify that, please.</p> <p>5 A. This is my testimony list from the last four years.</p> <p>6 Q. Are these depositions or just trials or both?</p> <p>7 A. Both.</p> <p>8 Q. Would you have copies of your depositions?</p> <p>9 A. No.</p> <p>10 Q. What would most of these cases involve?</p> <p>11 A. There is no one particular thing.</p> <p>12 Q. Would they be all biomechanical related?</p> <p>13 A. Either biomechanical or mechanical engineering.</p> <p>14 Q. And in mechanical engineering what would you testify</p> <p>15 to?</p> <p>16 A. For instance, there was one that I had that was a</p> <p>17 purely mechanical case. It was looking at timing and</p> <p>18 motion analysis on a big overhead crane in a steel</p> <p>19 mill.</p> <p>20 Q. And can you give me a percentage of how much you</p> <p>21 testify for defendants, insurance companies, and</p> <p>22 corporations versus the injured party?</p> <p>23 A. Most of my work is on the defense side.</p> <p>24 Q. When you say most, what are we talking about</p> <p>25 percentage wise, 90 percent?</p>	<p style="text-align: right;">Page 16</p> <p>1 A. I don't recall.</p> <p>2 Q. Did you look at Better Built's safety manual?</p> <p>3 A. I don't recall. If it was attached I would have</p> <p>4 looked through it.</p> <p>5 Q. So just kind of quickly going through your educational</p> <p>6 background, where did you go to high school?</p> <p>7 A. I graduated at Okemos High School in Michigan.</p> <p>8 Q. And then you went to State, Michigan State?</p> <p>9 A. Right.</p> <p>10 Q. And you graduated when?</p> <p>11 A. 1993.</p> <p>12 Q. And you got your degree in what?</p> <p>13 A. Mechanical engineering.</p> <p>14 Q. And then where did you go to get your next degree?</p> <p>15 A. I did my master's and my Ph.D. at the University of</p> <p>16 Michigan.</p> <p>17 Q. What did you get your master's in?</p> <p>18 A. What or when?</p> <p>19 Q. What?</p> <p>20 A. In mechanical engineering.</p> <p>21 Q. When?</p> <p>22 A. 1994.</p> <p>23 Q. And what did you get your Ph.D. in?</p> <p>24 A. Mechanical engineering.</p> <p>25 Q. What year?</p>

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<p style="text-align: right;">Page 17</p> <p>1 A. 1997.</p> <p>2 Q. Between '83 and '94 did you work?</p> <p>3 A. '93?</p> <p>4 Q. I'm sorry, I thought you said you graduated from State</p> <p>5 in '83?</p> <p>6 A. No, '93.</p> <p>7 Q. Is biomechanics part of the mechanical engineering</p> <p>8 program either at State or in your master's or Ph.D.?</p> <p>9 A. I took electives that were related to biomechanics.</p> <p>10 So for instance at Michigan State I took an anatomy</p> <p>11 and physiology class and then took a couple of</p> <p>12 biomechanics electives and did some independent</p> <p>13 research with biomedical applications of mechanical</p> <p>14 engineering. And then when I got to Michigan for grad</p> <p>15 school I worked in a lab that was focused on</p> <p>16 musculoskeletal biomechanics. And you had your choice</p> <p>17 of whether you wanted to be based in mechanical or</p> <p>18 based in biomedical for the actual degree, and I chose</p> <p>19 to get the mechanical engineering degree. But again</p> <p>20 there were electives that were related to anatomy and</p> <p>21 physiology and different types of biomechanics.</p> <p>22 Q. But you didn't get a degree in biomechanics, you got a</p> <p>23 degree in mechanical engineering?</p> <p>24 A. That's correct.</p> <p>25 Q. And would the class work be substantially different</p>	<p style="text-align: right;">Page 19</p> <p>1 rulings were for all of my cases in terms of whether</p> <p>2 they called it mechanical engineering or biomechanics</p> <p>3 or biomedical engineering or biomechanical</p> <p>4 engineering; people call it different things.</p> <p>5 Q. I'm asking you specifically were you called on to</p> <p>6 testify as a biomechanical engineer and you were</p> <p>7 qualified as an expert in that particular area?</p> <p>8 A. Yes.</p> <p>9 Q. And that was in a trial?</p> <p>10 A. Yes.</p> <p>11 Q. But you don't remember which trial?</p> <p>12 A. Like I said, I don't remember which terminology they</p> <p>13 used in each trial.</p> <p>14 Q. When you say you don't know what terminology they</p> <p>15 used, what do you mean by that?</p> <p>16 A. As I said, sometimes they will call it biomechanical</p> <p>17 engineering, other times they will call it</p> <p>18 biomechanics, other times they will say mechanical and</p> <p>19 biomedical engineering, other times they will just say</p> <p>20 mechanical engineering. So I don't remember for each</p> <p>21 of these cases which term they actually used because</p> <p>22 they can be pretty interchangeable.</p> <p>23 Q. Would you be able to look at your list and tell your</p> <p>24 lawyer after today's deposition which ones you</p> <p>25 qualified as a biomechanical engineer?</p>
<p style="text-align: right;">Page 18</p> <p>1 for biomechanical engineering versus mechanical?</p> <p>2 A. No.</p> <p>3 Q. There is not additional biomechanical classes that you</p> <p>4 would take in order to get a biomechanical degree?</p> <p>5 A. First of all, I don't know that there are any actual</p> <p>6 biomechanical degrees in engineering in any place.</p> <p>7 And so what you find people doing is either they will</p> <p>8 major in mechanical engineering or biomedical</p> <p>9 engineering and then you focus in on your subject</p> <p>10 area. So for instance in mechanical some people did</p> <p>11 fluids, some people did controls, some people did</p> <p>12 dynamics, other people took bio applications of all of</p> <p>13 those things. So that's what I did. I was basically</p> <p>14 a dynamics and controls person but did biomedical</p> <p>15 applications of all of those areas. And then if</p> <p>16 somebody was in the biomedical engineering department,</p> <p>17 they would decide did they want to be more electrical,</p> <p>18 more chemical, or more mechanical, and then they could</p> <p>19 be more mechanical, and so there was a lot of overlap</p> <p>20 with the classes.</p> <p>21 Q. Have you ever been qualified as an expert in any court</p> <p>22 in biomechanical engineering?</p> <p>23 A. Yes.</p> <p>24 Q. What court?</p> <p>25 A. A number of them. I don't remember what all the</p>	<p style="text-align: right;">Page 20</p> <p>1 A. No.</p> <p>2 Q. What part of E-385 did you review?</p> <p>3 A. I went through quite a bit of it, but the parts that</p> <p>4 were relevant were the parts about fall protection.</p> <p>5 Q. Would it be fair to say that you have never testified</p> <p>6 regarding fall protection from a scaffold before?</p> <p>7 A. I don't recall. I know I have had some scaffolding</p> <p>8 cases where there were falls involved, and I have also</p> <p>9 testified in other cases where there were falls from</p> <p>10 heights. So one I do remember there was an issue that</p> <p>11 he was not wearing fall protection when he fell off a</p> <p>12 beam, it was an iron worker. But there may have been</p> <p>13 other ones besides that in the past.</p> <p>14 Q. It doesn't appear that you were given the two</p> <p>15 depositions of the defendant Better Built's expert,</p> <p>16 would that be correct?</p> <p>17 A. That's everything that I have on there.</p> <p>18 Q. Did you ask why you weren't given Better Built's</p> <p>19 expert's deposition?</p> <p>20 A. It might have been an expert in an area that wasn't</p> <p>21 relevant to my testimony. Since I don't know what the</p> <p>22 name is, I don't know what's missing.</p> <p>23 Q. There are a lot of witnesses here --</p> <p>24 A. Right.</p> <p>25 Q. -- who don't have any expertise in your area but they</p>

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<p style="text-align: right;">Page 21</p> <p>1 were given to you, correct?</p> <p>2 A. Right.</p> <p>3 Q. So if they gave you these which have nothing to do</p> <p>4 with your expertise, did you ask why didn't you give</p> <p>5 me your expert's deposition?</p> <p>6 A. If I didn't know something was out there I couldn't</p> <p>7 ask for it.</p> <p>8 Q. And I see you weren't given Clark's expert's</p> <p>9 deposition either; would that be correct?</p> <p>10 A. I don't know. I don't recall reading one.</p> <p>11 Q. And so you had a meeting with Clark's attorney and</p> <p>12 Better Built's attorney about three weeks ago,</p> <p>13 correct?</p> <p>14 A. It was a few weeks ago. I don't remember what the</p> <p>15 date was.</p> <p>16 Q. How long was that meeting?</p> <p>17 A. Maybe about an hour, we met over lunch.</p> <p>18 Q. Could you please tell me what your opinion is?</p> <p>19 A. My opinion in this case is that Mr. Dancer would not</p> <p>20 have been injured as severely if he had been using his</p> <p>21 fall protection.</p> <p>22 Q. Any other opinions?</p> <p>23 A. My opinions all get rolled into that one. So that's</p> <p>24 the basic opinion.</p> <p>25 Q. Did you look at the issue of the failure of Better</p>	<p style="text-align: right;">Page 23</p> <p>1 units?</p> <p>2 A. I believe that's what the picture showed.</p> <p>3 (Exhibit No. 11 (Picture) marked for</p> <p>4 identification.)</p> <p>5 Q. Were you aware that E-385 required -- were you aware</p> <p>6 that E-385 applied to everyone who worked on this</p> <p>7 project?</p> <p>8 A. Yes.</p> <p>9 Q. Were you aware that E-385 applied to Better Built?</p> <p>10 A. That's my understanding.</p> <p>11 Q. Were you aware that E-385 applied to Clark?</p> <p>12 A. Yes.</p> <p>13 Q. Were you aware that E-385 applied to Leidal &amp; Hart?</p> <p>14 A. Yes. Again my understanding is that it was whoever</p> <p>15 was working on the site.</p> <p>16 Q. Were you aware that E-385 required -- strike that,</p> <p>17 Were you aware that Better Built's own safety</p> <p>18 manual required that all scaffolding comply with</p> <p>19 E-385?</p> <p>20 A. I'm not aware of that.</p> <p>21 Q. Were you aware that E-385 required all competent</p> <p>22 people working on the scaffolding to be trained by the</p> <p>23 manufacturer?</p> <p>24 A. I'm not aware of that.</p> <p>25 Q. Are you -- do you know if any of the competent people</p>
<p style="text-align: right;">Page 22</p> <p>1 Built and Clark to have bridging between the two Hydro</p> <p>2 Mobile scaffolds?</p> <p>3 A. No.</p> <p>4 MR. DAVIDSON: Let me object to the form of</p> <p>5 that question.</p> <p>6 Q. Do you realize there was an eight to ten foot gap</p> <p>7 between the two Hydro Mobile units that were planned?</p> <p>8 A. I believe that's the dimension that I have seen so</p> <p>9 far, yes.</p> <p>10 Q. And you saw that in the picture?</p> <p>11 A. Right, pictures, and the other documentation and</p> <p>12 people's testimony.</p> <p>13 Q. Were you aware that several days before Ronnie</p> <p>14 Dancer's fall from the Hydro Mobile scaffolding on the</p> <p>15 opposite wall there was Hydro Mobile units that had</p> <p>16 bridging?</p> <p>17 A. No.</p> <p>18 Q. Would you agree that there were no outriggers present</p> <p>19 to support the planking between the two Mobile</p> <p>20 scaffold units from which Ronnie Dancer fell?</p> <p>21 A. I don't know. I didn't do an analysis of the</p> <p>22 scaffolding system.</p> <p>23 Q. Would you agree that the planking from which Ronnie</p> <p>24 Dancer fell had no outriggers supporting the boards in</p> <p>25 the eight to ten foot gap between the Hydro Mobile</p>	<p style="text-align: right;">Page 24</p> <p>1 working for Leidal &amp; Hart or anyone else working on</p> <p>2 this project were trained by the manufacturer of the</p> <p>3 Hydro Mobile scaffolding?</p> <p>4 A. I don't know.</p> <p>5 Q. Are you aware that there were no competent people on</p> <p>6 this project because no one was trained by the</p> <p>7 manufacturer pursuant to Better Built's own rules?</p> <p>8 MR. DAVIDSON: Object to the form of the</p> <p>9 question.</p> <p>10 A. I don't know.</p> <p>11 Q. Are you aware that Ronnie Dancer was not trained by</p> <p>12 the manufacturer of the Hydro Mobile?</p> <p>13 A. I don't know.</p> <p>14 Q. If Better Built's own rules required a competent</p> <p>15 person to be trained by the manufacturer and Ronnie</p> <p>16 Dancer was not trained by the manufacturer, he</p> <p>17 wouldn't be a competent person on this project,</p> <p>18 correct?</p> <p>19 A. I wasn't asked to look at any of that.</p> <p>20 Q. Are you aware that E-385 required that the</p> <p>21 construction of the Hydro Mobile units be in</p> <p>22 compliance with the owner's and operator's manual of</p> <p>23 Hydro Mobile?</p> <p>24 A. I don't know.</p> <p>25 Q. Are you aware that the Hydro Mobile owner's manual and</p>

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<p style="text-align: right;">Page 25</p> <p>1 operator's manual required that bridging be used with 2 the scaffolding units? 3 A. I don't know. Like I said, I didn't do an analysis of 4 the scaffold or what the rules were for the scaffold. 5 Q. Okay. All right. 6 I'm going to show you Exhibit No. 11. Would 7 you take a look at that. That's a bridge for a ten 8 foot area for the Hydro Mobile, okay? 9 A. Okay. 10 Q. Have you ever seen that before? 11 A. I don't believe so. 12 Q. And that bridging unit, the ten foot one, has three 13 different outriggers, correct? 14 A. Yes. 15 Q. And those three outriggers support the planks as shown 16 in the picture, correct? 17 A. Yes. 18 Q. Are you aware that E-385 22.N.01 states mass climbing, 19 work platform shall be erected, used, inspected, 20 tested, maintained, and repaired in accordance with 21 ANSI A92.9 and the manufacturer's recommendations as 22 outlined in the operator's manual? 23 A. No, I don't think I looked at that. 24 Q. So as we sit here today, you do not know if the Hydro 25 Mobile scaffolding was in compliance with the E-385</p>	<p style="text-align: right;">Page 27</p> <p>1 Q. I'm asking you as an expert. 2 A. I don't know what the standard interpretation is of 3 secured. So I don't have an opinion about that. 4 Q. What does secured mean to you? 5 A. It's going to depend on the application. 6 Q. What does secured mean in common language? 7 MR. KIMBREL: Asked and answered. 8 Q. Does that mean bolted down, tied? 9 A. It depends on the application. 10 Q. Well, tell me what application are we talking about 11 relative to scaffolding planking? 12 MR. KIMBREL: Counsel, she's made it clear 13 she's not talking about that particular planking nor 14 the scaffolding system. So she has not studied that. 15 MR. BENNER: We're exploring her biomechanical 16 and mechanical background in rendering this opinion, 17 so I would like to have an answer. 18 MR. KIMBREL: If she doesn't want to speculate 19 on something that she's not prepared to testify to 20 today, I think she has every right to tell you she has 21 not studied that within the context you are asking her 22 about. 23 MR. BENNER: So it's speculation to tell me 24 what a secure planking is, is that your position? 25 MR. KIMBREL: Within the context that you are</p>
<p style="text-align: right;">Page 26</p> <p>1 22.N.01, correct? 2 A. That's right. I have no opinions about the 3 construction of the scaffold. 4 Q. Did you look at E-385, I, -- sorry -- E-385 22.B.08.C 5 relative to planking? 6 A. I don't remember. 7 Q. 22.B.08 section C says planking shall be secured to 8 prevent loosening, tipping, or displacement and 9 supported or braced to prevent excessive spraying or 10 deflection. Intermediate beams shall be provided to 11 prevent dislodgment of the planks due to deflection. 12 Did you ever read that? 13 A. I don't recall. 14 Q. Do you know if the planking on the Hydro Mobile unit 15 from which Ronnie Dancer fell complied with 22.B.08.C? 16 A. Like I said, I don't have any opinions about the 17 construction of the scaffolding. 18 Q. Do you know if the planking on that scaffolding was 19 secured? 20 A. My understanding is that the ends were not tied down. 21 Q. Was the planking -- so if the planks weren't tied 22 down, that would be a violation of 22.B.08.C which 23 says the planking shall be secured, correct? 24 A. I don't have any opinions about how the rules are 25 interpreted on the site.</p>	<p style="text-align: right;">Page 28</p> <p>1 asking the question, Counsel. She's given you three 2 nos and said not within the context. 3 Q. Can you tell me what secured to prevent loosening 4 means? 5 A. Like I said, it's going to depend on the application. 6 Q. Can you tell me what secured to prevent tipping means? 7 A. Same thing, it depends on the application. 8 Q. Can you tell me what secured to prevent displacement 9 means? 10 A. The same thing I just said, it depends on the 11 application. 12 Q. Do you know if the planking on which Ronnie Dancer 13 fell from was supported? 14 A. At least a couple of points it was supported. 15 Q. Was it supported by any outriggers? 16 A. Again, I have not done a full analysis of all the 17 scaffolding construction. 18 Q. Well, let me ask you, was the planking secured by 19 outriggers in the eight to ten foot gap between the 20 Hydro Mobile units? 21 A. My understanding is that it was resting at both ends 22 but then there was that eight to ten foot gap in 23 between. 24 Q. In the eight to ten foot gap there were no outriggers, 25 correct?</p>

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<p style="text-align: right;">Page 29</p> <p>1 A. I believe that is what the pictures showed.</p> <p>2 Q. In the eight to ten foot gap there was no place for</p> <p>3 the beams to -- the planking to rest on in the eight</p> <p>4 to ten foot gap, correct?</p> <p>5 A. I believe so.</p> <p>6 Q. Would you agree that the planking in the eight to ten</p> <p>7 foot gap was not secured?</p> <p>8 A. Well, again I don't know what the interpretation is</p> <p>9 for secured for this construction application. Again</p> <p>10 it was resting on something on the ends, but then</p> <p>11 there was nothing in the middle. So I don't know what</p> <p>12 the standard construction site interpretation is of</p> <p>13 secured, so I'm not going to speculate on that.</p> <p>14 Q. Would you agree that the planking was not secured as</p> <p>15 provided for by a bridge system, the eight to ten foot</p> <p>16 bridge system?</p> <p>17 A. Like I said, I don't know. I don't have opinions</p> <p>18 about the construction of the scaffold or the</p> <p>19 planking.</p> <p>20 Q. Would you agree that it's better to have the bridge in</p> <p>21 the eight to ten foot gap versus having unsupported</p> <p>22 planking in the eight to ten foot gap?</p> <p>23 MR. KIMBREL: You mean if somebody is going to</p> <p>24 walk on it without a vest, is that what you are</p> <p>25 asking?</p>	<p style="text-align: right;">Page 31</p> <p>1 Q. I'm speaking specifically regarding Ronnie Dancer in</p> <p>2 this case, the overlapping of the boards versus having</p> <p>3 a bridge system with three outriggers as shown in</p> <p>4 Exhibit 11; which is the optimal work surface?</p> <p>5 A. It depends on the application.</p> <p>6 Q. The specific application is what Ronnie Dancer was</p> <p>7 faced with.</p> <p>8 A. It keeps coming back to though that if Mr. Dancer had</p> <p>9 been wearing his fall protection he would not have</p> <p>10 fallen 40 feet. So that's really what my opinion is</p> <p>11 in this case.</p> <p>12 Q. So your opinion is, would it be fair to say, that even</p> <p>13 though the manufacturer requires that there be</p> <p>14 bridging and E-385 requires Better Built, Clark, and</p> <p>15 Leidal to have bridging, that doesn't affect your</p> <p>16 opinion?</p> <p>17 A. That's correct.</p> <p>18 Q. Would you agree if there would have been bridging</p> <p>19 there Ronnie Dancer wouldn't have fallen?</p> <p>20 A. No.</p> <p>21 Q. Why not?</p> <p>22 A. Because again there are different applications, there</p> <p>23 are different ways of falling. So it's -- again, I</p> <p>24 wasn't asked to look at the actual construction of the</p> <p>25 scaffold. So what I'm looking at is in this case</p>
<p style="text-align: right;">Page 30</p> <p>1 MR. BENNER: No, I'm not asking that at all.</p> <p>2 MR. KIMBREL: Within the context of this</p> <p>3 lawsuit?</p> <p>4 MR. BENNER: Within the context of this</p> <p>5 lawsuit.</p> <p>6 MR. KIMBREL: So you are asking again just</p> <p>7 generically.</p> <p>8 MR. BENNER: No, I'm asking specifically</p> <p>9 relative to this lawsuit.</p> <p>10 A. I don't have an opinion about that.</p> <p>11 Q. Would you agree that the bridging system --</p> <p>12 MR. KIMBREL: You can't laugh at your own</p> <p>13 question before you get it out.</p> <p>14 MR. BENNER: I know what the answer is going</p> <p>15 to be.</p> <p>16 MR. KIMBREL: I'm sorry. I have been</p> <p>17 withholding all my comments until then. So one per</p> <p>18 deposition is not bad.</p> <p>19 MR. BENNER: I know where we're going in the</p> <p>20 dep and I know what her answer is going to be.</p> <p>21 Q. Would you agree in Exhibit 11 that the ten foot</p> <p>22 bridging system would provide a more solid base than</p> <p>23 overlapping the planking?</p> <p>24 A. It depends on the application. Again I don't have an</p> <p>25 opinion about the construction of the scaffold.</p>	<p style="text-align: right;">Page 32</p> <p>1 given the way things were constructed, if Mr. Dancer</p> <p>2 had been wearing his fall protection as he was</p> <p>3 required to do then he would not have fallen.</p> <p>4 Q. Mr. Dancer wouldn't have fallen if Clark and Better</p> <p>5 Built had followed -- and Leidal &amp; Hart who were</p> <p>6 required to follow E-385 in the operator's manual,</p> <p>7 there would have been three outriggers supporting the</p> <p>8 boards, correct?</p> <p>9 MR. KIMBREL: I'm going to object to the</p> <p>10 foundation of that question.</p> <p>11 A. Actually that's not my understanding. My</p> <p>12 understanding is that Mr. Dancer was not on the lower</p> <p>13 work surface when he fell, he was on the upper</p> <p>14 section. So there were two different areas. There</p> <p>15 was a higher walking area and a lower working area.</p> <p>16 Q. Okay. Your opinion is he fell from the higher working</p> <p>17 area?</p> <p>18 A. I'd have to go back and check. But even if you have</p> <p>19 planks that are in this picture that you have here,</p> <p>20 depending on where the planks are it's still possible</p> <p>21 to have an overhang. So I don't have an opinion as to</p> <p>22 whether the accident would have happened exactly the</p> <p>23 way it did if this type of bridging system was used.</p> <p>24 I wasn't asking to look at that. I was asked to look</p> <p>25 at whether or not having fall protection, using the</p>

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<p style="text-align: right;">Page 33</p> <p>1 safety harness as it was intended to be used, if that 2 would have prevented the injuries. And my answer to 3 that is yes. 4 Q. So there are two levels to the Hydro Mobile unit, 5 correct? 6 A. Again looking at the units versus looking at what was 7 connected to the units, I have not done a full 8 analysis of the scaffolding system. 9 Q. Did he fall from the lower level or the higher level? 10 A. I would have to go back and check. I don't recall now 11 specifically. I would want to make sure I have the 12 right thing in my head. 13 Q. You want to take a break? 14 A. I can look it up here quickly. 15 Q. Look it up. 16 MR. KIMBREL: Let's take a break for a minute. 17 (Brief break taken.) 18 Q. When we broke you were going to look at your notes to 19 refresh your memory about what level Mr. Dancer was on 20 when he fell. 21 A. Right. I apologize. I was picturing the wrong thing. 22 It was the lower working surface that he fell on. 23 Q. So if he was working on the lower working surface, 24 then this Exhibit 11 which shows there being three 25 outriggers supporting the planks would be correct,</p>	<p style="text-align: right;">Page 35</p> <p>1 Better Built why didn't you have a bridging unit on 2 the Hydro Mobile units that Ronnie Dancer was working 3 on? 4 A. No. 5 Q. That wouldn't be important to you? 6 A. Not for my opinion in this case. 7 Q. We're all concerned about people falling, right? 8 A. Presumably. 9 Q. And you have written all these articles on people 10 falling, right? 11 A. Yes. 12 Q. So why wouldn't you with all this knowledge and 13 background and written articles say hey, people fall, 14 why wouldn't you have a bridging unit to support the 15 eight to ten foot gap between the Hydro Mobile units? 16 MR. DAVIDSON: Object to the form of the 17 question. 18 A. That's a question for people who know what the normal 19 processes and procedures are for the construction 20 site. I don't know what those procedures were using 21 these Hydro Mobile units. 22 Q. So just so I -- what you are telling me is you don't 23 know what the process is for constructing the units 24 for the Hydro Mobile scaffolding, correct? 25 A. That's not something that I have done at a</p>
<p style="text-align: right;">Page 34</p> <p>1 right? 2 A. That picture you have, right, does have three 3 outriggers supporting the planks. 4 Q. And you agree that in the eight to ten foot area that 5 we're talking about, there were no outriggers in the 6 eight to ten foot area supporting the planks, correct? 7 A. Right. 8 Q. Are you aware that the adjacent Hydro Mobile unit on 9 the opposite wall which had a bridge for those units, 10 nobody fell from that bridge, correct? 11 A. I don't know. 12 Q. You have never been told by the Better Built or Clark 13 or through their attorneys that there was a bridging 14 unit on the adjacent wall for the Hydro Mobile 15 scaffolding units, correct? 16 A. I don't recall. 17 Q. You don't know or you don't recall? Or why do you say 18 you don't recall? 19 A. I don't know if there was a bridging unit there or 20 not. It may have come up in one of the other 21 documents or it might have come up in conversation. I 22 just don't remember. 23 Q. If it came up in conversation that there was a 24 bridging unit on the opposite wall for the Hydro 25 Mobile units, did you ask the attorneys for Clark and</p>	<p style="text-align: right;">Page 36</p> <p>1 construction site and I don't have an opinion as to 2 the proper way to do that on this particular 3 construction site. So again, that didn't play a role 4 in my opinions in this case. 5 Q. But you think you're qualified to say when you should 6 be using a lanyard and vest on a construction site? 7 A. Again, what I was asked to look at is whether the use 8 of a fall protection system would have prevented the 9 injuries. And the answer to that is yes. 10 Q. But that wasn't my question. 11 MR. BENNER: Can you read the question back to 12 her. 13 (Previous question read by court reporter.) 14 A. And my answer is what I said. I wasn't asked to give 15 an opinion about sort of the rules about wearing the 16 lanyard and the safety vest. The question that I was 17 asked is whether the use of that vest would have 18 prevented the injuries. 19 Q. So as we sit here you have no opinion as to whether 20 Ronnie Dancer was required to use a lanyard and vest 21 while working on the Hydro Mobile scaffolding unit, 22 correct? 23 A. My understanding is that if they were working over six 24 feet they were supposed to wear the fall protection or 25 they could be protected by the working environment.</p>

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<p style="text-align: right;">Page 37</p> <p>1 So if there were guard rails on three sides and then 2 there was the wall, so they were boxed in, they 3 wouldn't have a fall. But then when they would open 4 the gate to get building materials or if they were in 5 another position where they were exposed to a fall, 6 then they were supposed to use the safety harness and 7 lanyard. That's my understanding. 8 Q. Where did you get that understanding? 9 A. From the file material I looked at. 10 Q. Well, the file material that you looked at, E-385 11 required that the planks all be secured, correct? 12 A. Like I said, I don't have an opinion on how the 13 scaffold was constructed. 14 Q. You just told me he should have been -- what you told 15 me was he should have been wearing a lanyard and vest, 16 right? 17 A. I said if he had been wearing the lanyard and vest he 18 would not have fallen. 19 Q. My question is you have no opinion as to whether he 20 should have been wearing a lanyard and vest when he 21 fell, correct? 22 A. If the potential was there for him to be exposed to a 23 potential fall, then yes, he was supposed to be 24 wearing the lanyard and the vest. So that's the -- 25 since he was changing the -- moving the scaffolding,</p>	<p style="text-align: right;">Page 39</p> <p>1 those planks? 2 A. It still depends on what the overhang is for the 3 planks. If the planks were still overhanging one end 4 or the other, you could still end up in a position 5 with a board flipping. So you can't get rid of the 6 risk entirely. 7 Q. You have no idea as we sit here whether there would be 8 any overhang on the planks at all, do you? 9 A. I don't think anybody does because that would be a 10 completely different scaffolding setup. And like I 11 said, I don't have an opinion on the scaffolding 12 setup. 13 Q. Yes. So if you don't know what the correct setup for 14 the scaffolding with a bridge, you have no idea 15 whether there would be any planking overlap, correct? 16 MR. DAVIDSON: Let me object to the form of 17 the question. You inserted a new word, correct setup, 18 into that, and that had never been part of the 19 question. I think the witness has said -- 20 MR. BENNER: Wait a minute. Is that form and 21 foundation or is this a running monologue that you are 22 not supposed to give. And I forgot, insurance defense 23 lawyers don't have to follow the rules. I forgot. Go 24 ahead, just give her the whole answer. Let's swear 25 him in. Go ahead.</p>
<p style="text-align: right;">Page 38</p> <p>1 that's the question there, did he know that he was 2 going to be exposed to a fall since he was moving 3 planks. And since the -- it was not in the same 4 position it had been in that morning. So again, I'm 5 not here to give opinions about the construction site 6 protocols. My opinion is that if he had been wearing 7 the vest and the lanyard that he would not have 8 fallen. 9 Q. I'm asking you since you are venturing an opinion 10 about whether he should have worn the lanyard and 11 vest, if there would have been a bridge there he 12 wouldn't need the lanyard and vest, correct? 13 A. I don't know. 14 Q. Wouldn't a bridge eliminate the chances of a fall? 15 A. No, not entirely. 16 Q. What are you basing that on? 17 A. You are still 40 feet in the air, planks could still 18 be in the wrong position, so you could still have a 19 fall even with the bridging system. 20 Q. If you had three outriggers do you think it's as 21 likely that he would have -- supporting the planking 22 in the eight to ten foot gap, do you think it's as 23 likely for him to fall as overlapping the boards 24 between the eight to ten foot gap without any 25 outriggers in the eight to ten foot area to support</p>	<p style="text-align: right;">Page 40</p> <p>1 MR. DAVIDSON: Keep asking your stupid 2 questions. 3 MR. BENNER: You think they're stupid, fine. 4 MR. KIMBREL: You lasted an hour and-a-half, I 5 want to acknowledge that, Brian. I did appreciate the 6 first hour and 28 minutes. 7 MR. BENNER: I didn't hide all the documents 8 like you did, Larry. Shame on you. 9 MR. KIMBREL: Is there a question pending? I 10 apologize. 11 MR. BENNER: No. I'm waiting for you guys to 12 muzzle yourselves. 13 Q. You have no idea if there is a bridge setup between 14 the different scaffold units whether there would be 15 any overlap of the planks, do you? 16 MR. DAVIDSON: Object to the form of the 17 question. It's not complete. 18 Q. Go ahead. 19 A. It would depend on how the planks were laid. 20 Q. And you are aware that those planks would be tied 21 down, secured or bolted, correct? 22 A. I don't know. 23 Q. You don't know because you never bothered to look at 24 E-385 or the owner's manual to see what the 25 requirements were relative to bolting and securing the</p>

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<p style="text-align: right;">Page 41</p> <p>1 planking, correct?</p> <p>2 A. That's not an area I was asked to look at.</p> <p>3 Q. Do you know where Ronnie Dancer would have tied off</p> <p>4 with a lanyard on the -- when he was on the bridge, do</p> <p>5 you know what area, where he would tie off?</p> <p>6 A. Not specifically.</p> <p>7 Q. Do you know if there was any area for him to tie off</p> <p>8 on this scaffold when he was on the bridge?</p> <p>9 A. I don't know what the specific location would have</p> <p>10 been.</p> <p>11 Q. Do you know how far the lanyard would have to extend</p> <p>12 to the area which he would tie off?</p> <p>13 A. No, I don't have that number handy.</p> <p>14 Q. So you as we sit here would have no idea if the --</p> <p>15 where the anchor point is on the scaffolding that</p> <p>16 Ronnie Dancer should have attached himself to when he</p> <p>17 was on the bridge, correct?</p> <p>18 A. Correct.</p> <p>19 Q. Do you know if the structure would have taken the</p> <p>20 weight that Ronnie Dancer would have placed on it if</p> <p>21 he was tied off?</p> <p>22 A. No. Again that's part of all the regulations that the</p> <p>23 tie off points are supposed to withstand a certain</p> <p>24 amount of force.</p> <p>25 Q. But you don't know?</p>	<p style="text-align: right;">Page 43</p> <p>1 see what the actual question is that they are looking</p> <p>2 at.</p> <p>3 Q. Did you do any research on lanyards breaking on falls?</p> <p>4 A. Some.</p> <p>5 Q. And is that in your packet of materials?</p> <p>6 A. I have the OSHA documentation that I looked at, and</p> <p>7 like I said, there is that other paper that talks</p> <p>8 about how they developed the rules and how they</p> <p>9 developed the guidelines for the safety harnesses and</p> <p>10 lanyards.</p> <p>11 Q. But my specific question really was have you looked at</p> <p>12 any materials or articles relative to lanyards</p> <p>13 breaking on falls?</p> <p>14 A. It is brought up at least in the large paper that I</p> <p>15 mentioned. But again, it was just sort of in the</p> <p>16 context of the history of how they developed all these</p> <p>17 different systems.</p> <p>18 Q. But you haven't read anything recently regarding that?</p> <p>19 A. Not with the current discussions that are going on,</p> <p>20 no.</p> <p>21 Q. Just so that I understand, you are not here to talk</p> <p>22 about the proper construction of scaffolding, correct?</p> <p>23 A. Right.</p> <p>24 Q. You are not here to talk about the -- if Ronnie Dancer</p> <p>25 was required to wear a lanyard and vest before his</p>
<p style="text-align: right;">Page 42</p> <p>1 A. I don't know.</p> <p>2 Q. Are you aware that ANSI Z-359 committee is working on</p> <p>3 the issue of the break point on the lanyards when on</p> <p>4 scaffolds?</p> <p>5 A. No, I'm not aware specifically of what that committee</p> <p>6 is looking at right now.</p> <p>7 Q. Are you aware that that committee has concerns with</p> <p>8 the lanyards breaking when people are at the 90 degree</p> <p>9 point on the fall off the scaffolding?</p> <p>10 A. No, I wasn't specifically aware of that.</p> <p>11 Q. And so if there is a problem with the lanyards</p> <p>12 breaking that the ANSI Z-359 is concerned with when on</p> <p>13 scaffolds with the lanyards breaking, then you</p> <p>14 wouldn't be positive whether the lanyard would have</p> <p>15 secured Ronnie Dancer from the fall, correct?</p> <p>16 A. If you are looking at all possible outcomes, then no,</p> <p>17 I can't know all possible outcomes. But given most</p> <p>18 cases given what the safety harnesses are supposed to</p> <p>19 do and what the lanyards are supposed to do, then it</p> <p>20 makes sense that if he had fallen that he would not</p> <p>21 have fallen the 40 feet in all likelihood.</p> <p>22 Q. You are not even aware that this is an issue that the</p> <p>23 ANSI Z-359 committee is working on about lanyards</p> <p>24 breaking, correct?</p> <p>25 A. I don't know the context. I would have to go back and</p>	<p style="text-align: right;">Page 44</p> <p>1 fall, correct?</p> <p>2 A. Well, like I said, my understanding is that he was if</p> <p>3 there was going to be any sort of exposure to a</p> <p>4 possible fall.</p> <p>5 Q. Did you read the Clark's expert's opinion that said if</p> <p>6 Ronnie Dancer thought he put the boards back correctly</p> <p>7 he wasn't required to wear a lanyard and vest?</p> <p>8 A. I don't recall.</p> <p>9 Q. You don't recall because you never read it, correct?</p> <p>10 A. Right. I don't think I have his deposition.</p> <p>11 Q. So beyond not recalling, you never read that expert's</p> <p>12 opinion?</p> <p>13 A. If you could give me the name I could make sure.</p> <p>14 Q. I don't have his name but he's not on the list.</p> <p>15 A. Okay.</p> <p>16 Q. Did you ever read Eric Koshurin's deposition?</p> <p>17 A. I don't think so.</p> <p>18 Q. Eric Koshurin was an electrician who was on the bridge</p> <p>19 a few days to two weeks before Ronnie Dancer's fall,</p> <p>20 and he almost fell from the bridging area because the</p> <p>21 planking started to tip. Did you ever -- were you</p> <p>22 ever advised of that?</p> <p>23 A. I think one of the other witnesses might have</p> <p>24 mentioned it.</p> <p>25 Q. Which witness?</p>

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<p style="text-align: right;">Page 45</p> <p>1 A. I don't recall.</p> <p>2 Q. Did you read Mr. Allen's deposition?</p> <p>3 A. That's not on there so probably not.</p> <p>4 Q. Mr. Allen was another subcontractor who was up on the</p> <p>5 scaffolding too.</p> <p>6 Were you aware that Eric Koshurin went to Cory</p> <p>7 Hanson and told him he almost fell off the planking</p> <p>8 between the two bridges; were you ever made aware of</p> <p>9 that?</p> <p>10 A. I don't recall.</p> <p>11 Q. One of the reasons you don't recall is because you</p> <p>12 were never given Eric Koshurin's dep to read, correct?</p> <p>13 A. Right, I don't recall if that ever came up in anybody</p> <p>14 else's deposition.</p> <p>15 Q. Were you advised that Eric Koshurin testified that</p> <p>16 after he told Cory Hanson that he almost fell from the</p> <p>17 planks in this bridging area that Cory Hanson said he</p> <p>18 would take care of it?</p> <p>19 A. I don't think so. I don't remember seeing that.</p> <p>20 Q. Would that be important to your opinion as to this</p> <p>21 being a dangerous area before Ronnie Dancer's fall,</p> <p>22 and that the safety person, Cory Hanson, said he would</p> <p>23 take care of it?</p> <p>24 MR. DAVIDSON: Object to the form of the</p> <p>25 question.</p>	<p style="text-align: right;">Page 47</p> <p>1 don't know if there were other products that he could</p> <p>2 have been using.</p> <p>3 Q. What other products are we talking about now?</p> <p>4 A. Well, just depending on where the tie off was just</p> <p>5 sort of looking at -- I don't know what his -- let's</p> <p>6 just say I know what he did have available to him.</p> <p>7 There are lots of other possibilities out there, I did</p> <p>8 not look at all those other possibilities. I'll say</p> <p>9 it that way.</p> <p>10 Q. When you say there are lots of other possibilities,</p> <p>11 what do you mean by that? I'm lost.</p> <p>12 A. Different kinds of lanyards with retractor mechanisms</p> <p>13 and things like that. And that's not what we're</p> <p>14 talking about here.</p> <p>15 Q. Let me ask you, what sort of lanyard did you think he</p> <p>16 did have?</p> <p>17 A. Again, I've got the exemplar right here.</p> <p>18 Q. I'm asking you to just tell me. How long is the</p> <p>19 lanyard?</p> <p>20 A. It's a six foot lanyard.</p> <p>21 Q. Is it retractable?</p> <p>22 A. No. There is no retractor on it.</p> <p>23 Q. Are you now contending that he didn't have the right</p> <p>24 lanyard up there?</p> <p>25 A. No.</p>
<p style="text-align: right;">Page 46</p> <p>1 A. I'm not sure what the question is there.</p> <p>2 Q. My question would be would it be important to your</p> <p>3 opinion to know that Eric Koshurin almost fell from</p> <p>4 this bridging area where the planks are unsecured and</p> <p>5 unsupported in that eight to ten foot area, and he</p> <p>6 told Cory Hanson about it and Cory Hanson said he</p> <p>7 would take care of that. Would that be important to</p> <p>8 your opinion?</p> <p>9 A. No. That doesn't change my opinion about the use of</p> <p>10 the safety harness.</p> <p>11 Q. Really your opinion is hey, if he would have had a</p> <p>12 safety harness on it would have lessened his injuries;</p> <p>13 is that correct?</p> <p>14 A. Yes, it would have significantly lessened his</p> <p>15 injuries.</p> <p>16 Q. And as part of your opinion you have no idea where you</p> <p>17 tie off when you are on the bridge on the scaffolding,</p> <p>18 correct?</p> <p>19 A. I don't know in that particular area where the tie off</p> <p>20 is; that's correct.</p> <p>21 Q. And you have no idea how long the lanyard would have</p> <p>22 to be in order for him to be able to tie off and still</p> <p>23 be on the bridge, correct?</p> <p>24 A. I'm just being careful on terminology. Right now</p> <p>25 there is the fixed lanyard that he was wearing. But I</p>	<p style="text-align: right;">Page 48</p> <p>1 MR. BENNER: We need to take a five minute</p> <p>2 break so I can ask some more dumb questions.</p> <p>3 (Brief break taken.)</p> <p>4 Q. You had a chance to review Mike Wright's deposition,</p> <p>5 he's my expert, correct?</p> <p>6 A. Yes.</p> <p>7 Q. Did you see his discussion about a life line?</p> <p>8 A. I believe so.</p> <p>9 Q. Would you agree that there should have been a life</p> <p>10 line on the scaffolding for the workers to tie their</p> <p>11 lanyards off if necessary?</p> <p>12 A. I don't have an opinion on that.</p> <p>13 Q. You don't have an opinion as if there was a life line</p> <p>14 up there it would have been more feasible to tie off</p> <p>15 than not tie off; is that correct?</p> <p>16 A. If there was a cable running the whole length of the</p> <p>17 walkway, then yes, that would have been a good place</p> <p>18 to tie off on to.</p> <p>19 Q. You would agree that there was no life line on this</p> <p>20 scaffold, correct?</p> <p>21 A. I don't know. I have seen conflicting testimony about</p> <p>22 that.</p> <p>23 Q. Who do you think says there was a life line, if you</p> <p>24 know?</p> <p>25 A. I don't know. Like I said, I know that's kind of a</p>

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<p style="text-align: right;">Page 49</p> <p>1 question as to whether there was one or not.</p> <p>2 Q. Would you agree that there is no testimony that anyone</p> <p>3 actually saw Ronnie Dancer move the boards?</p> <p>4 A. Right. I don't believe anyone saw him doing that.</p> <p>5 Q. Do you have an opinion as to whether any of the safety</p> <p>6 people appointed by either Clark or Better Built were</p> <p>7 qualified under E-385 to be the site safety person?</p> <p>8 A. I don't have an opinion on that.</p> <p>9 Q. Do you have an opinion whether the site safety and</p> <p>10 health people appointed by the two general</p> <p>11 contractors, Better Built and Clark, performed their</p> <p>12 duties in accordance with E-385?</p> <p>13 A. I don't have an opinion on that.</p> <p>14 Q. You are not here to give an opinion what the OSHA</p> <p>15 industry standards are for scaffolding; is that</p> <p>16 correct?</p> <p>17 A. Correct.</p> <p>18 Q. You are not here to give an opinion as to what the</p> <p>19 ANSI standards are for scaffolding, correct?</p> <p>20 A. Correct.</p> <p>21 Q. You are not here to give an opinion on the</p> <p>22 requirements of E-385 relative to scaffolding tying</p> <p>23 off?</p> <p>24 A. Correct.</p> <p>25 Q. You are not here to give an opinion as to what the</p>	<p style="text-align: right;">Page 51</p> <p>1 Q. Do you have any opinion as to whether there should</p> <p>2 have been two competent persons working on the</p> <p>3 scaffolding when it was being raised and lowered?</p> <p>4 A. No.</p> <p>5 Q. Do you have an opinion as to whether Ronnie Dancer was</p> <p>6 a competent person to work on the Hydro Mobile</p> <p>7 scaffolding pursuant to Better Built's rules?</p> <p>8 A. No.</p> <p>9 Q. Do you have an opinion as to whether Ronnie Dancer was</p> <p>10 a competent person to work on the scaffolding?</p> <p>11 A. No.</p> <p>12 Q. Do you agree with my expert Michael Wright's opinion</p> <p>13 that if there had been a bridge between the two Hydro</p> <p>14 Mobile units as required by the owner and operator's</p> <p>15 manual and E-385 that this injury to Ronnie Dancer</p> <p>16 would not have occurred?</p> <p>17 A. I don't have an opinion on that.</p> <p>18 Q. Do you have an opinion as to what would be the most</p> <p>19 secured work platform, the bridging unit used by and</p> <p>20 required by the manufacturer and E-385 and Better</p> <p>21 Built's own rules between the two scaffolding units --</p> <p>22 that being the Hydro Mobile scaffolding units -- or</p> <p>23 overlapping of planks that have no outriggers between</p> <p>24 eight to ten foot gap; which one is better?</p> <p>25 A. I don't have an opinion on that.</p>
<p style="text-align: right;">Page 50</p> <p>1 OSHA industry standards are relative to tying off on</p> <p>2 scaffolding, correct?</p> <p>3 A. Correct.</p> <p>4 Q. You are not here to give an opinion as to what the</p> <p>5 ANSI standards are relative to tying off on</p> <p>6 scaffolding, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And you are not here to give an opinion as to whether</p> <p>9 Better Built and/or Clark's site safety people took</p> <p>10 steps to abate the hazards relative to the scaffolding</p> <p>11 on this project?</p> <p>12 A. Correct.</p> <p>13 Q. Do you have an opinion as to whether the planking</p> <p>14 boards that were being used to overlap the eight to</p> <p>15 ten foot gap between the Hydro Mobile units from which</p> <p>16 Ronnie Dancer fell were the right size?</p> <p>17 A. I don't have an opinion on that.</p> <p>18 Q. Do you have an opinion as to whether the site safety</p> <p>19 people from Better Built or Clark or Leidal &amp; Hart</p> <p>20 enforced the use of using lanyards and scaffolding</p> <p>21 while the workers were -- from Leidal &amp; Hart were</p> <p>22 working on the project or any other construction</p> <p>23 workers were using lanyards and vests while working on</p> <p>24 the scaffolding?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Do you know anyone who works for Clark Construction?</p> <p>2 A. I don't think so.</p> <p>3 Q. Do you know anybody who works for Better Built?</p> <p>4 A. I don't think so.</p> <p>5 Q. Do you know anybody who works for the Corps of</p> <p>6 Engineers?</p> <p>7 A. I don't think so.</p> <p>8 Q. Do you have a copy of your curriculum vitae laying</p> <p>9 right in front of you? Can I take a quick look at it?</p> <p>10 Thank you.</p> <p>11 MR. KIMBREL: Do you get paid for writing any</p> <p>12 of these?</p> <p>13 THE WITNESS: No.</p> <p>14 MR. KIMBREL: Just part of your Ph.D.?</p> <p>15 THE WITNESS: Yes.</p> <p>16 Q. You have written a lot of articles on walking and</p> <p>17 falling, correct?</p> <p>18 A. Yes.</p> <p>19 Q. And just so that I understand it, you are not offering</p> <p>20 any opinion relative to all the articles that you have</p> <p>21 written on walking and falling as it relates to Ronnie</p> <p>22 Dancer walking and falling from the scaffolding bridge</p> <p>23 unit between the two Hydro Mobile scaffolds, correct?</p> <p>24 A. Right. There is nothing specifically about this case</p> <p>25 that relates to a loss of balance or muscle fatigue or</p>

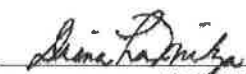

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<p style="text-align: right;">Page 53</p> <p>1 anything like that.</p> <p>2 Q. Your only opinion is relative to if he would have had</p> <p>3 a lanyard and vest on it might have reduced his</p> <p>4 injuries, correct?</p> <p>5 A. It would have definitely reduced his injuries, that's</p> <p>6 correct.</p> <p>7 Q. But as we sit here, you have no idea where he could</p> <p>8 have tied off on the Hydro Mobile scaffold units when</p> <p>9 he was on the bridge, correct?</p> <p>10 A. Right. I don't know what the appropriate tie off</p> <p>11 point was there.</p> <p>12 Q. In fact, you don't know if there was a tie off point</p> <p>13 with a seven foot lanyard that would have allowed him</p> <p>14 to use it while he was on the bridge, correct?</p> <p>15 A. I don't know if there was one stationary spot that</p> <p>16 would have let him walk the whole way, that's right.</p> <p>17 Q. And you are offering no opinion as to whether a</p> <p>18 bridging unit manufactured by Hydro Mobile, the ten</p> <p>19 foot unit that would have been put up between the</p> <p>20 Hydro Mobile scaffolding units would have prevented</p> <p>21 this injury, correct?</p> <p>22 A. Correct.</p> <p>23 Q. And you are not offering any opinion whether these</p> <p>24 planks would have been -- strike that.</p> <p>25 Would you agree that it would be better to</p>	<p style="text-align: right;">Page 55</p> <p>1 shifted when the scaffolding is going up, correct?</p> <p>2 A. Just from what I have read.</p> <p>3 Q. So it's fair to say none of the planks on this Hydro</p> <p>4 Mobile scaffolding unit, including the bridge, are</p> <p>5 secured, correct?</p> <p>6 A. I don't know.</p> <p>7 Q. Have you seen any pictures showing you that any of the</p> <p>8 boards are secured?</p> <p>9 A. I know they were not tied down on the ends.</p> <p>10 Q. Do you have any other reason to believe that since</p> <p>11 they were not tied down or -- strike that.</p> <p>12 Would you agree that plank safeties weren't</p> <p>13 used?</p> <p>14 A. That's my understanding is that there were no clamps</p> <p>15 or tie downs or anything on the ends.</p> <p>16 Q. Is there any other reason to believe that the boards</p> <p>17 were secured in any other fashion based upon your</p> <p>18 reading?</p> <p>19 A. I don't believe so.</p> <p>20 Q. So it would be fair to say that the boards, the planks</p> <p>21 on the lower level of the scaffolding were not either</p> <p>22 tied down, secured in any fashion, correct?</p> <p>23 A. That's my understanding is that they did not have any</p> <p>24 extra devices or anything holding the ends down.</p> <p>25 Q. As we sit here you are unaware of the ANSI Z-359</p>
<p style="text-align: right;">Page 54</p> <p>1 have the bridge unit planks with the three outriggers</p> <p>2 on the ten foot bridge versus overlapping boards over</p> <p>3 an eight to ten foot gap without any outriggers, you</p> <p>4 don't have an opinion on that, right?</p> <p>5 MR. DAVIDSON: Object to the form of the</p> <p>6 question. Form and foundation.</p> <p>7 A. That's right, I don't have an opinion for this</p> <p>8 specific application.</p> <p>9 Q. And you are not offering any opinion based on the</p> <p>10 facts of this case and Ronnie Dancer's injury as to</p> <p>11 when he should have been wearing his lanyard and vest,</p> <p>12 correct?</p> <p>13 A. Right, correct.</p> <p>14 Q. So really your opinion is limited to if Ronnie Dancer</p> <p>15 would have had a lanyard and scaffold -- I'm sorry --</p> <p>16 a lanyard and vest on and if there was a point that he</p> <p>17 could have tied off when he was on the bridge, which</p> <p>18 you don't know if there was or not, then that would</p> <p>19 have reduced his injuries, correct?</p> <p>20 A. Yes.</p> <p>21 Q. And you are taking no position on Clark's expert's</p> <p>22 opinion that Ronnie Dancer didn't need a lanyard and</p> <p>23 scaffolding (sic) when he was on the bridge, correct?</p> <p>24 A. Right.</p> <p>25 Q. And you have no idea how the boards are raised or</p>	<p style="text-align: right;">Page 56</p> <p>1 committee that's working on the issue of the lanyards</p> <p>2 breaking and causing workers to fall, correct?</p> <p>3 A. Correct.</p> <p>4 MR. DAVIDSON: Objection, asked and answered.</p> <p>5 Q. Is there any other opinion that you have that I</p> <p>6 haven't asked you about?</p> <p>7 A. Not at this time.</p> <p>8 Q. I wish you would have just said no.</p> <p>9 MR. KIMBREL: Can she amend?</p> <p>10 MR. BENNER: Yes, it would be okay with me.</p> <p>11 Q. Are you saying at this time meaning that if you are</p> <p>12 asked to do other things by the attorneys for either</p> <p>13 Clark or Better Built, you might have new opinions or</p> <p>14 additional opinions?</p> <p>15 A. Yes.</p> <p>16 Q. But as we sit here today you have no other opinions</p> <p>17 besides what you have told me explicitly as we sit</p> <p>18 here, correct?</p> <p>19 A. Correct.</p> <p>20 Q. Are there any articles or treatises that you agree are</p> <p>21 authoritative relative to falls using a lanyard and</p> <p>22 vest?</p> <p>23 A. Well, there is the one that you already marked. I</p> <p>24 thought that was a good kind of summation of a lot of</p> <p>25 the research in the area, and they have a bunch of</p>

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<p style="text-align: right;">Page 57</p> <p>1 footnotes and references they draw on.</p> <p>2 Q. Which one are you talking about? Okay. What you are</p> <p>3 showing me is Exhibit C, Survivable Impact Forces on</p> <p>4 Human Body Constrained by a Full Body Harness; is that</p> <p>5 correct?</p> <p>6 A. Right.</p> <p>7 Q. Does that deal specifically with falls from scaffolds?</p> <p>8 A. It's falls from any sort of heights where you are</p> <p>9 relying on a full body harness. And as I mentioned,</p> <p>10 they have a lot of footnotes in there, they went back</p> <p>11 and looked at a lot of literature that led to the fall</p> <p>12 tolerance data and the other numbers they used to</p> <p>13 design standard fall arrest systems.</p> <p>14 Q. Would Ronnie Dancer's height and weight have any</p> <p>15 impact on your opinions?</p> <p>16 A. No. He's actually right in the zone where they did</p> <p>17 most of the testing.</p> <p>18 Q. And how much do you think he weighs?</p> <p>19 A. I want to say at his deposition he said currently he</p> <p>20 was about 230 which was a little higher than he had</p> <p>21 been when he was working,</p> <p>22 Q. And how tall?</p> <p>23 A. That I don't recall.</p> <p>24 MR. BENNER: I don't have any other questions.</p> <p>25 Thanks for your time.</p>	<p style="text-align: right;">Page 59</p> <p>1 CERTIFICATE</p> <p>2 STATE OF MICHIGAN</p> <p>3 COUNTY OF MACOMB</p> <p>4</p> <p>5 I, Diana Lynn LaMilza, a Notary Public in</p> <p>6 and for the above county and state, do hereby certify</p> <p>7 that this deposition was taken before me at the time</p> <p>8 and place hereinbefore set forth; that the witness was</p> <p>9 by me first duly sworn to testify to the truth; that</p> <p>10 this is a true, full and correct transcript of my</p> <p>11 stenographic notes so taken; and that I am not</p> <p>12 related, nor of counsel to either party, nor</p> <p>13 interested in the event of this cause.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19  </p> <p>20 Diana L. LaMilza, CSR5085</p> <p>21 Notary Public</p> <p>22 Macomb County, Michigan</p> <p>23 My commission expires: 2-2-18</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 58</p> <p>1 MR. DAVIDSON: No questions.</p> <p>2 MR. KIMBREL: No questions.</p> <p>3 (Deposition concluded at 12:30 p.m.)</p> <p>4</p> <p>5 * * *</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

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**EXHIBIT 32**

STATE OF MICHIGAN  
COURT OF APPEALS

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DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW, CO.,

Defendant-Appellant.

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UNPUBLISHED

February 4, 2014

No. 312141

Oakland Circuit Court

LC No. 2004-059653-NO

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DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW, CO.,

Defendant-Appellant.

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No. 313606

Oakland Circuit Court

LC No. 2004-059653-NO

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Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

In docket no. 312141, defendant Barton Malow, Co., appeals as of right the trial court order entering the jury's verdict in favor of plaintiff, Douglas Latham, an employee of B&H Construction, in a construction accident matter involving the common work area doctrine. In docket no. 313606, defendant appeals as of right the trial court order awarding interest on attorney fees and taxable costs in favor of plaintiff. On December 13, 2012, these cases were consolidated for appellate review. We affirm.

I. FACTUAL BACKGROUND

Plaintiff, a carpenter employed by B&H Construction (B&H), was working on the Oakview School project in Lake Orion, Michigan, when the accident at issue occurred. He and his work partner were informed that their task for that day was to transport drywall boards upward on a scissor lift and install the drywall on a mezzanine. Before they did so, defendant's

superintendent approached them to verify that they had the appropriate license to use the scissor lift.

Plaintiff and his partner loaded the drywall boards onto the lift, and entered the lift to approach the mezzanine. Plaintiff parked the lift at a slight angle as he was taught, because the movement of material off of the lift would cause the weight to shift, and it would be dangerous if it was parked flush. According to plaintiff, he parked the lift only a couple of inches from the mezzanine, and the end of the lift was almost touching the mezzanine.

The guard cable on the mezzanine was taken down, and neither man was wearing any fall protection. As the men were moving a board of drywall onto the mezzanine from the lift, the board snapped, and plaintiff fell. According to plaintiff, his right foot was on the mezzanine and his left foot was in the air. While his partner yelled for him to grab onto the lift, plaintiff could not do so and fell to the ground. Plaintiff landed on his feet, and broke his left heel in four places and fractured his right one.

## II. PROCEDURAL BACKGROUND

Plaintiff initiated the instant suit against defendant, and relevant for this appeal, alleged that defendant was liable under the common work area doctrine. A long and complex procedural history ensued. Defendant filed its first motion for summary disposition on November 29, 2004, contending that plaintiff's claim failed under the common work area doctrine, as the danger at issue did not pose a high degree of risk to a significant number of workers. The trial court ultimately denied defendant's motion with respect to the common work area doctrine. Defendant appealed, and a panel of this Court affirmed. *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2006 (Docket No. 264243).<sup>1</sup> The defendant appealed to the Michigan Supreme Court, who granted leave and reversed the Court of Appeals. *Latham v Barton Malow Co*, 480 Mich 105; 746 NW2d 868 (2008).

The Court found that the lower courts "erred by misidentifying the danger," and that "the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment*." *Latham*, 480 Mich at 114 (emphasis in original). After remand, defendant filed a second motion for summary disposition,<sup>2</sup> arguing that plaintiff failed to present any evidence that workers accessed the elevated mezzanine without fall protection. The trial court granted defendant's motion for summary disposition.

However, plaintiff appealed as of right in this Court, and in an unpublished, per curiam opinion, a panel of this Court reversed. *Latham v Barton Malow Co*, unpublished opinion per

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<sup>1</sup> This will be referred to as *Latham I*.

<sup>2</sup> The parties disputed whether this was a "second" motion for summary disposition or merely a "renewed" first motion for summary disposition. For the purposes of clarity, it will be referred to as a second motion for summary disposition.

curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 290268).<sup>3</sup> The panel found, *inter alia*, that there was a genuine issue of material fact regarding whether the evidence satisfied the elements of the common work area doctrine. *Id.* The Michigan Supreme Court denied leave to appeal although it recognized that further discovery or motions for summary disposition were permitted, if appropriate. *Latham v Barton Malow Co*, 489 Mich 899; 796 NW2d 253 (2011).

After remand, defendant filed a third motion for summary disposition. Defendant argued that it was the construction manager, not general contractor, so it could not be found liable under the common work area doctrine. Defendant further argued that plaintiff could not satisfy the elements of the common work area doctrine. The trial court denied defendant's motion, and the case proceeded to trial. After a lengthy trial with several witnesses, the jury returned a verdict finding that defendant was 55 percent negligent, B&H was 22.5 percent negligent, and plaintiff was 22.5 percent negligent. The trial court had previously denied defendant's motion for a directed verdict, and subsequently denied defendant's motions for JNOV and new trial, and granted plaintiff taxable costs and sanctions. Defendant now appeals.

### III. CONSTRUCTION MANAGER

#### A. STANDARD OF REVIEW

Defendant first challenges the trial court's denial of dispositive relief based on defendant's role as a construction manager, not a general contractor.<sup>4</sup> As this Court recently articulated:

We review de novo the trial court's grant or denial of a directed verdict. When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. Conflicts in the evidence must be decided in the nonmoving party's favor to decide whether a question of fact existed. A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. [*Aroma Wines and Equipment, Inc v Columbia Distrib Servs, Inc*, \_\_Mich App\_\_; \_\_NW2d\_\_ (2013)]

<sup>3</sup> This will be referred to as *Latham II*.

<sup>4</sup> While this issue broadly refers to the denial of "dispositive relief," defendant specifically references its motion for summary disposition. Yet, the evidence cited in support of defendant's argument is testimony from the subsequent trial. As this Court has stated, when reviewing a motion for summary disposition, "[r]eview is limited to the evidence presented to the trial court at the time the motion was decided." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). Since the thrust of defendant's argument is based on the trial testimony, this issue is most accurately characterized as a challenge to the trial court's ruling on the directed verdict and JNOV motions.

(Docket No. 311145, issued December 17, 2013) (slip op at 3) (quotation marks and citations omitted).]

“This Court reviews de novo the trial court’s decision on a motion for JNOV.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We review all of the evidence and legitimate inferences in the light most favorable to the nonmoving party, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 492.

## B. ANALYSIS

The trial court properly determined that the common work area doctrine applied in the instant case as defendant had supervisory and coordinating authority during the project.

The traditional rule governing contractor liability was that a general contractor was not liable for the negligence of independent subcontractors. *Ghaffari v Turner Const Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). However, the common work area doctrine evolved to modify this precept. *Id.* As the Michigan Supreme Court has emphasized, “[w]e regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.” *Id.* (quotation marks, citation, and emphasis omitted). The theory behind the application of the common work area doctrine is that “the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors’ employees.” *Latham*, 480 Mich at 112.

In *Ghaffari*, the Supreme Court discussed at length the common work area doctrine, as well as the interplay with the open and obvious doctrine. Relevant for this case, the Court also included the following footnote: “Although, under the terms of its contract with the premises owner, [the defendant] was in fact a ‘construction manager,’ and not a ‘general contractor,’ the distinction is one without a difference for purposes of our analysis in this case.” *Ghaffari*, 473 Mich at 19 n 1. The Court provided no further analysis of this issue.<sup>5</sup>

The evidence at issue in this case likewise indicates that despite defendant’s argument to the contrary, because it had supervisory and coordinating authority on the jobsite, its title as a construction manager was therefore irrelevant for purposes of the common work area doctrine.<sup>6</sup> While defendant’s superintendent denied that he was in charge of supervising, he also admitted

<sup>5</sup> While defendant also cites to *Bethlehem Rebar Indus, Inc v Fidelity & Deposit Co of Maryland*, 582 A2d 442, 443 n 1 (RI, 1990), the court in that case specifically recognized: “[T]he mere self-serving label of CM or general contractor will not in and of itself determine a party’s legal status.”

<sup>6</sup> See also *Debeul v Barton Malow Co*, 489 Mich 982; 799 NW2d 176 (2011), where the Court denied leave on a case involving defendant, which involved this exact issue.

that if he saw something unsafe, he had the authority to contact the worker's employer and have the work stopped. Defendant's safety manager/coordinator also disclaimed the label of supervisory control, but admitted that defendant had the authority to direct work to be stopped, was exclusively responsible to administer the safety program, and had the responsibility to do regular onsite inspections. He further testified that defendant was responsible for coordinating the subcontractors or contractors, and monitoring their work. Therefore, while defendant's employees disavowed the term "supervisory control," their explanation of defendant's role onsite was consistent with having supervisory control.

Defendant argues that the applicable contractual language suggests otherwise. Defendant's expert testified that defendant only was responsible for coordination, not control, of the subcontractors. He relied on section 2.3.15 of the contract,<sup>7</sup> to conclude that defendant lacked control in this case because subcontractors had the responsibility for their own means and methods and the safety of their people, and the construction manager was not responsible for a contractor's failure to carry out the work nor did it have control over a contractor's acts or omissions. He further pointed to section 2.3.12 of the contract,<sup>8</sup> which stated that defendant's responsibility for coordination of safety programs did not extend to direct control over the acts or omissions of subcontractors. However, he conceded that based on this contract language, defendant had the overarching responsibility to ensure that B&H had a safety program, and to report to the owner any procedures that did not appear to be in conformity with industry standards. He further admitted that he was unaware that in its interrogatories, defendant stated that its superintendent was responsible for coordinating and supervising the work of various contractors.

Moreover, plaintiff's expert testified that because defendant was the designee for administering the safety program, defendant was the controlling contractor responsible for overall jobsite safety, regardless of any contract language to the contrary. He further opined that "[t]here always has to be one entity that's ultimately responsible for safety. And it's very clear

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<sup>7</sup> "2.3.15 With respect to each Contractor's own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction. The Construction Manager shall not be responsible for a Contractor's failure to carry out the Work in accordance with the respective Contract Documents. The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager."

<sup>8</sup> "2.3.12 The Construction Manager shall review the safety programs developed by each of the Contractors for purposes of coordinating the safety programs with those of the other Contractors. The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors, or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction Manager."

in this case that that was [defendant].” He testified that defendant’s superintendent “ha[d] the responsibility for coordinating supervision of the work of various contractors. That’s the function of a construction manager or a general contractor.” He claimed that it was “ludicrous” for the superintendent to testify that he did not know he had supervising authority on the job site.

Merely because defendant’s control was limited in certain respects does not negate the evidence that it had significant supervisory authority over the project. Moreover, while defendant certainly is correct that there can be differences between a construction manager and a general contractor, that does not translate to mean that a construction manager is never liable under the common work area doctrine. See *Ghaffari*, 473 Mich at 19 n 1. Further, absent from defendant’s analysis is Article 14 of its contract with the school, which in pertinent part states:

14.3 On the basis of its regular on-site observations, Construction Manager will report to the Owner any construction means, methods, techniques, sequences, or procedures that do not appear to conform with industry standards, and shall also report to Owner any work that appears not to be in conformance with contract documents.

14.4 The Construction Manager shall timely inform both the Owner and the Architect of any observed defects or deficiencies in the quality of workmanship of the various contractors.

14.5 The Construction Manager *shall provide daily full-time on-site field supervision*<sup>9</sup> at the new middle school site during the entire construction phase. The Owner reserves the right to approve the identity of the Construction Manager’s field supervisor, and to require the replacement of the field supervisor upon two (2) weeks’ notice.

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14.7 The Construction Manager shall inspect the work of the trade contractors on the project as it is being performed until final completion and acceptance of the project by the Owner to assure, insofar as the CM is reasonably able, that the work performed and the materials furnished are in accordance with the contract documents and that work on the project is progressing on schedule. In the event that the quality control testing should indicate that the work, as installed, does not meet the requirements of this project, the Architect shall determine the extent of the work that does not meet the requirements and the Construction Manager shall direct the trade contractor(s) to take appropriate corrective action, and advise the Owner of the corrective action.

As plaintiff’s expert testified, these sections were significant as they implicated who had ultimate authority for the jobsite, and whether there were readily observable dangers.

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<sup>9</sup> (Emphasis added).

The trial court did not err in denying defendant dispositive relief based on its claim that as a construction manager, it could not be liable under the common work area doctrine.

#### IV. JURY INSTRUCTION

##### A. STANDARD OF REVIEW

Defendant next argues that the trial court improperly instructed the jury regarding the elements of the common work area doctrine.<sup>10</sup> Claims of instructional error are reviewed de novo. *Cox ex rel Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 40; 651 NW2d 356 (2002). “However, to the extent that the review requires an inquiry into the facts, we review the trial court’s decision on underlying factual issues for an abuse of discretion.” *Id.* An abuse of discretion occurs when the result of the trial court’s decision falls outside the range of reasonable and principled outcomes. *Nelson v Dubose*, 291 Mich App 496, 500; 806 NW2d 333 (2011). “Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice.” *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005) (quotation marks and citation omitted).

“A trial court’s decision regarding a motion for a new trial is reviewed for an abuse of discretion.” *McManamon v Redford Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). “An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes.” *Id.*

##### B. ANALYSIS

Defendant is not entitled to relief based on any error in the special jury instruction.

As our Supreme Court has explained, jury “instructions should include all the elements of the plaintiff’s claims and should not omit material issues, defenses, or theories if the evidence supports them.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). We review jury instructions as a whole, and they “must not be extracted piecemeal to establish error.” *Id.* “Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury.” *Id.*

In the instant case, the trial court read the following instruction to the jury:

For the Plaintiff to prevail in proving that the Defendant Barton Malow was negligent, the Plaintiff must prove the following:

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<sup>10</sup> Defendant does not challenge that a special jury instruction was warranted, but merely argues that the instruction given did not adequately represent the law.

1. Barton Malow failed to take reasonable steps within its supervising and coordinating authority.

2. To guard against readily-observable and avoidable damages (sic).

3. That created a quote, “high degree of risk,” quote, to a quote, “significant number of workers,” unquote.

And 4. In a common work area.

A, quote “readily-observable and avoidable danger,” unquote, is an avoidable danger to which a significant number of workers are exposed, which in this case is whether a significant number of workers were exposed to an avoidable injury by being required to work at dangerous heights without fall protection equipment in a common work area. A, quote, “significant number of workers,” unquote, is not defined, but six workers does not constitute a significant number of workers.

Quote, “The high degree of risk to a significant number of workers must exist when the Plaintiff is injured, not after construction has been completed,” unquote. There’s a citation there for the lawyers’ sake, not for you.

Quote “It has not—it is not necessary that other subcontractors be working on the same site at the same time. It merely requires that employees of two or more subcontractors eventually work in the area,” unquote. Again, another citation, which you don’t need to worry about.

A, quote, “common work area,” unquote, is defined as the same area where two or more trades would eventually work.

Defendant first argues that this instruction impermissibly blurred the lines between the elements of the common work area doctrine, namely, the “high degree of risk to a significant number of workmen” and the “common work area element.” Defendant focuses on the following part of the instruction: “It has not—it is not necessary that other subcontractors be working on the same site at the same time. It merely requires that employees of two or more subcontractors eventually work in the area.” This language is consistent with *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997), where this Court stated: “It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area.”

Viewed in isolation, this sentence may lead to the confusion defendant suggests. However, jury instructions must be reviewed as a whole, as they “must not be extracted piecemeal to establish error.” *Case*, 463 Mich at 6. As a whole, the instruction adequately informed the jury of the respective elements of the common work area doctrine. Consistent with the instruction, a high degree of risk to a significant number workers will not be satisfied with just six employees of one subcontractor, *Alderman v JC Dev Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), and for “a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work[.]” *Groncki v Detroit Edison Co*,

453 Mich 644, 663; 557 NW2d 289 (1996). Even if somewhat imperfect, reversal is not warranted because on balance, the instruction adequately and fairly presented the elements of the common work area doctrine to the jury. See *Case*, 463 Mich at 6.

Defendant also contends that the instruction impermissibly contravened the law that the high degree of risk to a significant number of workers must exist at the time plaintiff was injured. Defendant focuses on one sentence in a footnote in the Michigan Supreme Court's opinion in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 60 n 12; 684 NW2d 320 (2004), which states: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." From this sentence, defendant concludes that the focus must be at the exact time of plaintiff's injury, and that the jury instruction in this case did not properly reflect that.

Of initial significance is that the instruction in this case included the *Ormsby* language, stating "[t]he high degree of risk to a significant number of workers must exist when the Plaintiff is injured, not after construction has been completed." Moreover, as plaintiff notes, defendant has raised this issue before. In *Latham I*, defendant raised this same issue, and the panel responded as follows:

Defendant maintains that the Supreme Court in *Ormsby* held that the plaintiff's injury must result from a condition that posed a high risk of danger to a significant number of other workers at the time of the plaintiff's injury. We believe that defendant has read footnote 12 out of context. In footnote 12, the Court was responding to Justice Kelly's dissent, so the footnote must be read in the context of Justice Kelly's dissenting opinion. Properly viewed, our Supreme Court did not limit the doctrine to only those situations where other workers are also exposed to a high risk at the same time the plaintiff was injured. Instead, the test requires that a significant number of workers must work in the same area and be subjected to the same risk at some point during construction. Contrary to defendant's argument, while the common work area doctrine required plaintiff to prove that the condition that caused his injury would affect a significant number of other employees, plaintiff was not required to prove that a significant number of other employees were at risk at the same time plaintiff was injured. The doctrine focuses on the risk to other workers during the construction phase. Thus, the focus is on whether the condition that caused the plaintiff's injury would expose a significant number of other workers to the same risk of danger when they would be required to work in the same area.

In this case, plaintiff faced the danger of working on an elevated platform that did not have any permanent perimeter protection to protect him from falling while loading materials onto the mezzanine. The trial court was properly aware of the danger to plaintiff when it noted that other workers, like plaintiff, "required fall protection as the area was accessible only by ladders or lifts and the Defendant's Construction Supervisor testified that, like the Plaintiff, these workers also had to remove existing safety cabling for entry and exiting purposes. Moreover, the trial court correctly concluded that there was a genuine issue of material fact whether the mezzanine was a common work area that several

workers would need to access to complete their work. There was evidence that employees of two or more other subcontractors, including plumbers, electricians, and painters, had to access the mezzanine to perform their work. Like plaintiff, these workers also had to reach that area using a ladder or lift without perimeter protection. Thus, these other workers were exposed to the same risk of falling from the mezzanine while loading materials onto it. [*Latham I*, unpub op at 2-3 (citations omitted).]

While the Supreme Court granted leave and reversed based on this Court's incorrect identification of the danger, the Court also stated:

The lower courts correctly noted that workers from several trades had to work at the mezzanine level at the same time. Hence, an issue of fact was created concerning whether the mezzanine was a common area. Various subcontractors needed to get onto the mezzanine numerous times over several days in order to work and load materials and equipment. By a rough estimate, a dozen workers, including carpenters, electricians, plumbers, painters, and at least four people to load heating, ventilation, and cooling equipment needed to get onto the mezzanine. After the wooden frame for the drywall was put in, there were only two ways to reach the mezzanine: by ladder and by scissor lift. All these workers faced the danger of falling from the mezzanine while loading materials or equipment. Accordingly, an issue of material fact arose about whether a significant number of workers employed by various subcontractors were exposed to the same risk. [*Latham*, 480 Mich at 121.]

Therefore, plaintiff correctly notes that the Michigan Supreme Court seemingly agreed with the panel's analysis in *Latham I* regarding the appropriate time frame to consider. The jury instruction in the instant case was consistent with that interpretation.<sup>11</sup>

Defendant's interpretation of *Ormsby* is flawed. Even ignoring the context of the footnote, which was a response to the dissent, the isolated sentence defendant focuses on reads as follows: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby*, 471 Mich at 60 n 12. While defendant focuses on the phrase "exist when the plaintiff is injured," it ignores the second part of that sentence, namely, "not after construction has been completed." *Id.* In divorcing the first part of the sentence from the second, defendant overlooks that the Court was referencing the time during which construction was ongoing not after it was completed.

The 6th Circuit recently adopted the same analysis. While federal case law is not binding on state courts, it can be considered persuasive. *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999) ("Though not binding on this Court, federal precedent

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<sup>11</sup> While defendant argues that the law of the case doctrine does not apply in cases involving summary disposition as they merely raise questions of fact, the legal issue of what time period to consider is not a question of fact.

is generally considered highly persuasive when it addresses analogous issues.”). The 6th Circuit held as follows:

In *Ormsby*, the court also stated that the ‘high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed.’ [The defendant] interprets this language to suggest that the number of workers and subcontractors must be measured at the exact moment that the worker is injured. But this interpretation would ignore the second half of the sentence. Read as a whole, the sentence is consistent with the rest of the *Ormsby* opinion and with the prior opinions . . . . The comparison to ‘after the work is completed’ suggests that the time when the plaintiff is injured’ refers to the time *period* during the ongoing construction—not to a specific moment. When a construction phase is over, the nature and extent of the risk to workers presumably changes, and is no longer the ‘same risk.’

Of course, discerning the relevant time period need not involve a binary choice—during, or after, construction. Rather, it follows from *Ormsby* and its predecessors that the relevant time is the time period during which the hazardous activity is occurring or will occur—whether it lasts one hour, one day, or for the duration of a particular construction stage. The length of the relevant time period is defined by the continued existence of the same risk of harm in the same area. [*Richter v American Aggregates Corp*, 522 Fed Appx 253, 263 (CA 6, 2013) (emphasis in original) (quotation marks and citation omitted).]

Therefore, defendant has failed to demonstrate any instructional error requiring reversal.

## V. COMMON WORK AREA DOCTRINE

### A. STANDARD OF REVIEW

Lastly, defendant argues that the trial court erred in denying it dispositive relief based on plaintiff’s failure to satisfy the elements of the common work area doctrine. As stated above, this Court reviews de novo the trial court’s denial of a directed verdict, viewing the evidence in the light most favorable to plaintiff, and drawing all reasonable inferences in plaintiff’s favor. *Aroma Wines and Equipment, Inc.*, \_\_ Mich App at \_\_ (slip op at 3). All conflicts in the evidence are decided in plaintiff’s favor, and the motion only should be granted if no factual questions exist on which reasonable minds could differ. *Id.* This Court also reviews de novo a trial court’s denial of a JNOV motion. *Wiley*, 257 Mich App at 491. All of the evidence and legitimate inferences are viewed in the light most favorable to plaintiff, and the motion should be granted only if the evidence failed to establish a claim as a matter of law. *Id.* at 492.

### B. ELEMENTS OF THE DOCTRINE

Plaintiff produced sufficient proofs at trial to prevail under the common work area doctrine.<sup>12</sup>

The elements of the common work area doctrine are: “(1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area.” *Latham*, 480 Mich at 109. Only when all elements of this test are satisfied may a general contractor be held liable for the alleged negligence of the employees of independent subcontractors. *Ghaffari*, 473 Mich at 21.

#### 1. FAILURE TO TAKE REASONABLE STEPS WITHIN AUTHORITY

As discussed *supra*, defendant’s argument that it lacked supervisory and coordinating authority is without merit. Further, defendant’s superintendent and safety manager/coordinator both admitted that defendant had the authority to order that work be stopped if it was being performed unsafely, and to require subcontractors to instruct their employees to comply with safety regulations. Defendant had the authority to do onsite inspections, to administer the safety program, and to report to the owner any procedures that did not appear in conformity with industry standards. Yet, defendant did none of that. It did not instruct plaintiff or his employer that fall protection was needed, nor did it attempt to stop plaintiff from accessing the mezzanine in an unsafe fashion. Moreover, as plaintiff acknowledged, donning a harness system would have been useless in this instance, as neither defendant nor anyone else had established anchor points.

Because defendant did not instruct B&H that their employees had to wear safety protection or that plaintiff and his partner had to stop working without it, defendant “failed to take reasonable steps within its supervisory and coordinating authority[.]” *Latham*, 480 Mich at 109.

#### 2. READILY OBSERVABLE AND AVOIDABLE DANGER

Our Supreme Court has defined the danger in this case as follows: “the danger that created a high degree of risk is correctly characterized as the danger of *working at heights without fall-protection equipment*.” *Latham*, 480 Mich at 114 (emphasis in original).<sup>13</sup> As

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<sup>12</sup> Defendant contends the law of the case doctrine does not apply to this issue. Regardless of whether that argument has any merit, the trial court properly denied defendant’s directed verdict and JNOV motions based on the evidence produced at trial. While defendant again references its motion for summary disposition and cites to that brief, the evidence it relies on in this section is from trial, not evidence from the summary disposition motion. Thus, this will be reviewed as a challenge to the trial’s court’s ruling on the directed verdict motion and the JNOV.

<sup>13</sup> While defendant contends that after remand plaintiff’s theory changed because he admitted he had access to fall protection, this does not alter the identification of the danger. Regardless of whether plaintiff had access to fall protection, it was not used, nor did defendant instruct him or

confirmed by defendant's safety manager/coordinator, working at heights is one of the top four causes of fatalities on construction jobsites. Before plaintiff and his partner accessed the mezzanine in this case, defendant's superintendent approached them to ensure that they had the appropriate license. At no time did he instruct or ask them if they planned on using fall protection. He admitted he was aware the workers planned on going up to the mezzanine, the cable had to come down when that happened, and that was when the hazard of working at heights without fall protection was created. Plaintiff's expert also testified that based on his review and the superintendent's admission that there were no anchor points, the hazard was readily observable, and no one took reasonable steps to protect workers from the serious risk of injury.

Defendant, however, contends that the danger was not readily observable because plaintiff alone created the hazard, which was a combination of the dangerously parked scissor lift, plaintiff's refusal to wear fall protection, and his decision to walk from the scissor lift to the mezzanine. However, as noted above, our Supreme Court has already defined the danger in this case as "the danger of *working at heights without fall-protection equipment*." *Latham*, 480 Mich at 114 (emphasis in original). Defendant's superintendent also admitted he knew this danger would result when plaintiff and his partner accessed the mezzanine with the removed cable. Defendant's safety manager/coordinator conceded that had plaintiff used fall protection, the accident would not have occurred. Plaintiff's expert concurred, explaining that the only cause of plaintiff's fall was the lack of fall protection. Furthermore, while plaintiff may have contributed to the danger in not using the fall protection gear available to him, that is consistent with the jury's verdict that plaintiff was partially at fault. That does not, however, absolve defendant from its responsibility in administering the safety programs to ensure that safety protection was utilized on the construction site.

Therefore, the evidence supports the jury's finding of a readily observable and avoidable danger. *Latham*, 480 Mich at 109.

### 3. HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKERS

There also was evidence of a high degree of risk to a significant number of workers. As our Supreme Court has articulated, six employees of one subcontractor does not constitute a significant number of workers. *Alderman*, 486 Mich at 906. In the instant case, when asked how many workers had to access the mezzanines, the superintendent testified as follows:

First ones would be the ironworkers would actually set up all the beams and flooring and decking, and then the concrete people would go up there and pour a floor. And then they would start building the walls, metal walls. . . . And then the drywall, and then they'd put the equipment up there, and then they'd go up and paint and all. . . . The electricians would be before the walls went up. They'd put in the conduit.

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order otherwise, so the danger remained of "*working at heights without fall-protection equipment*." *Latham*, 480 Mich at 114 (emphasis in original).

He further testified that plumbers and HVAC workers also accessed the mezzanines. Thus, the jury could have concluded that this constituted a significant number of workers, especially as it was correctly instructed that “significant number” had to be more than six.

Defendant, however, argues that no other worker was exposed to the precise danger of walking from a crookedly parked scissor lift to a mezzanine without fall protection. Yet, as noted above, the Supreme Court defined the danger more broadly in this case, as “the danger of *working at heights without fall-protection equipment*.” *Latham*, 480 Mich at 114 (emphasis in original). Furthermore, the superintendent referenced significant materials that the other trades were installing or constructing on the mezzanine, and there was significant evidence that such workers were not using fall protection when transporting such materials or equipment. Scott Schrewe, a carpenter for B&H, testified that after plaintiff’s accident, he was called to fill the absence. He and his partner used the lift to access the mezzanine and likewise had to remove the cable in order to move materials to the mezzanine. Schrewe testified that no one discussed with him any type of fall protection needed to exit the lift onto the mezzanine, and that he and his partner never used any type of fall protection. This evidence demonstrates that despite plaintiff’s accident, the workers continued to access the mezzanine without fall protection.

Furthermore, the superintendent detailed the extent of his lack of knowledge regarding fall protection, even at the time of trial, as follows: he never received defendant’s safety regulations; he did not know that one of defendant’s onsite safety requirements in their loss program was for every worker working at heights over six feet to have a safety belt and harness; he was further unaware that people working at heights needed fall protection; and he did not know that, as a superintendent, he was required to make sure workers used safety belts, harnesses, and lanyards.

Considering evidence that other workers accessed the mezzanine without fall protection, and the superintendent’s admission that he did not even know fall protection was needed, there was sufficient evidence that there was a high degree of risk to a significant number of workers. *Latham*, 480 Mich at 109.<sup>14</sup>

#### 4. COMMON WORK AREA

Lastly, there was significant evidence that a common work area existed. The Michigan Supreme Court has stated that for “a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work.” *Groncki*, 453 Mich at 663. Here, the mezzanine was not an isolated or particularized area in which only few or particular trades worked. Rather, the superintendent detailed the numerous workers from different trades that worked on the mezzanines, which suffices as evidence of a common work area.

Defendant also generally challenges that the specific work plaintiff performed did not require fall protection and that at least 15 to 20 other workers accessed elevations using an

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<sup>14</sup> While defendant again raises the issue of the proper time period in which to evaluate this risk, that was addressed above.

alternate method, such as a ladder. Defendant produced witnesses who testified that plaintiff could have performed his task differently, in a way that did not require the use of safety measures such as a double harness system. However, there also was evidence indicating otherwise. Most significant, while defendant places great emphasis on the fact that plaintiff could have used a ladder to access the mezzanine and the lift to transport materials, as other trades had done, consistent with plaintiff's testimony, this overlooks the obvious: plaintiff still would have had to go onto the lift to remove the drywall boards. Plaintiff's partner confirmed that he could not think of another available method to perform the job that day. Plaintiff also testified that the only realistic method of moving the material to the mezzanine would be to take down the guard cable, and the superintendent knew that would happen.

## VI. CONCLUSION

Defendant's role as a construction manager was not fatal to plaintiff's claim, as defendant had supervisory and coordinating authority. The jury instruction regarding the elements of the common work area doctrine, when viewed as a whole, adequately conveyed the elements of the doctrine to the jury. Furthermore, defendant is not entitled to relief based on the trial court's denial of dispositive relief regarding plaintiff's evidence under the common work area doctrine.<sup>15</sup> We affirm.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

/s/ Michael J. Riordan

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<sup>15</sup> We note that defendant raises issues regarding *Latham II* only for purposes of preserving it for appeal, and to the case evaluation sanctions only in the event that we were to vacate the verdict. Therefore, we decline to address these alternate arguments.

**EXHIBIT 33**

STATE OF MICHIGAN  
COURT OF APPEALS

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EMILE RIHANI, Individually and as Next Friend  
of DEENA RIHANI, Minor,

Plaintiff-Appellee,

v

GREELEY & HANSEN OF MICHIGAN, LLC,

Defendant-Appellant.

and

CITY OF DETROIT and L D'AGOSTINI &  
SONS, INC,

Defendants.

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UNPUBLISHED  
October 25, 2005

No. 256921  
Lapeer Circuit Court  
LC No. 02-031545-NO

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EMILE RIHANI, Individually and as Next Friend  
of DEENA RIHANI, Minor,

Plaintiff-Appellee,

v

L D'AGOSTINI & SONS, INC,

Defendant-Appellant,

and

CITY OF DETROIT and GREELEY & HANSEN  
OF MICHIGAN, LLC,

Defendants.

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No. 256941  
Lapeer Circuit Court  
LC No. 02-031545-NO

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated cases arising out of a work-site accident, defendant Greeley & Hansen of Michigan, LLC (G&H), and defendant L. D'Agostini & Sons, Inc. (D'Agostini), appeal by leave granted the trial court's denial of their motions for summary disposition. Defendants also appeal the trial court's order precluding defendants from naming the city of Detroit a nonparty at fault, after the city was granted summary disposition on the basis of governmental immunity. We reverse in Docket No. 256921 because G&H was a subcontractor to plaintiff's employer, NTH Consultants, Ltd. (NTH), it did not owe plaintiff<sup>1</sup> a duty of care under the common work area doctrine. In Docket No. 256941, we affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

### I. Summary of Facts and Proceedings

In 1999, the city of Detroit contracted with D'Agostini to increase the capacity of its Detroit Water and Sewage Department (DWSD) Imlay City pumping station, which sent Lake Huron water north to the city of Flint and south to the Detroit area. D'Agostini contracted to provide five new pumping units, improve the existing pumping units, and add a new 108-inch water main with the ability for either line pump (route water directly through the station to its northern or southern destination), or could draw water from a huge concrete reservoir. That part of the project requiring work inside the reservoir was to commence in January 2001. In anticipation of this part of the project, the city drained most of the water from the reservoir. On November 13, 2000, DWSD construction inspector George Galster issued an AVO<sup>2</sup> to D'Agostini's project manager, Art Nichols, which read, "As of 10:15 AM 11.13.00 Imlay Station Reservoir has six inches of water in it. The pump was turned off, and it was turned over to the contractor." Nichols acknowledge receipt of the AVO by signing it on behalf of D'Agostini.

After the reservoir had been drained, D'Agostini employees cut a hole in its concrete wall to permit entry for a preliminary inspection inside. On November 16, 2000, Nichols wrote to Thomas DeRiemaker, the DWSD general superintendent of engineering, that certain structures inside the reservoir precluded D'Agostini from installing the proposed 108-inch pipe because "we do not have the room." Nichols also noted that cracks were observed in the walls and floor, which raised concern about the reservoir's structural integrity. Thereafter, the city hired NTH to assess the condition of the reservoir. The parties do not dispute the NTH survey was not part of the city's contract with D'Agostini, and that the city contracted directly with NTH for that work. DeRiemaker in his deposition explained that the city had an open agreement with NTH, and therefore, "it would be less expensive, and cleaner" to use NTH rather than to add this extra work to D'Agostini's contract. NTH subcontracted with G&H to assist in evaluating the reservoir. After entering the reservoir to take measurements on November 21, 2000, plaintiff, an NTH project engineer, fell into an unguarded sump pump pit and was seriously injured.

Plaintiff filed this negligence action against the city, D'Agostini, and G&H. After extensive discovery, the parties brought cross motions for summary disposition. D'Agostini

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<sup>1</sup> The singular plaintiff refers to Emile Rihani because Deena Rihani's claim is derivative.

<sup>2</sup> "AVO" means "avoid verbal orders."

argued that it was not the general contractor on the project, but rather a subcontractor to the city, which retained control over the premises. G&H asserted that as a subcontractor it did not have a duty to protect employees of other contractors and that the condition of the reservoir was open and obvious. The city argued that it was entitled to governmental immunity. Plaintiff moved for partial summary disposition, requesting an order declaring that D'Agostini, as general contractor, possessed and controlled the interior of the reservoir when plaintiff fell.

The trial court heard the motions on March 8, 2004, and read its rulings on them from the bench. First, the trial court ruled that the city was immune from tort liability under MCL 691.1401, *et seq.* The court reasoned that by operating a municipal water supply system, the city was engaged in the exercise or discharge of a governmental function. MCL 691.1407; MCL 691.1401(f). Further, the court concluded the public building exception, MCL 691.1406, did not apply because the pumping station was not open to the public. The court ruled that presence of workers for the renovation project did not alter this conclusion, citing *Dudek v Michigan*, 152 Mich App 81, 86; 393 NW2d 572 (1986).

Relying on *Munson v Vane Stecker*, 347 Mich 377; 79 NW2d 855 (1956), the trial court denied G&H's motion, reasoning that G&H owed a duty of reasonable care in favor of NTH employees because the two contractors were working together toward a common goal. Thus, the trial court concluded a question of fact remained whether G&H "properly exercised its duty of reasonable care." The court also rejected G&H's argument that the sump pit was an open and obvious danger, finding that questions of fact existed regarding the nature of the danger presented by the unguarded pit and whether the risk of harm remained unreasonable even if the danger was found to be open and obvious.

The trial court denied D'Agostini's motion, finding that plaintiff had presented evidence raising material issues of fact that if decided in plaintiff's favor would impose liability on D'Agostini under the common work area doctrine. The court noted that plaintiff produced evidence that D'Agostini possessed and controlled the interior of the reservoir after the city had drained most of the water from it. Thereafter, D'Agostini created a hole in a wall of the reservoir permitting access to its interior. Further, the court reasoned that under its contract with the city, D'Agostini was responsible for all aspects of the project, including overall job safety.

The elements of the common work area doctrine require a plaintiff to establish that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 54; 684 NW2d 320 (2004). Here, the trial court noted that evidence indicated employees of D'Agostini, the city, G&H, and NTH were all working in and around the reservoir on the day plaintiff fell into the sump pump pit. Thus, the trial court reasoned that from this evidence a jury could find a common work area existed. Further, the trial court found that plaintiff presented testimony and other evidence from which a jury could conclude the unguarded sump pump pit was a readily observable, avoidable hazard that presented a high degree of risk to a significant number of workers. Thus, the trial court reasoned, the evidence presented a question of fact for the jury to resolve whether D'Agostini breached its duty of care as general contractor to take reasonable steps to protect against the hazardous condition that resulted in plaintiff being injured.

The trial court also granted plaintiff's motion for partial summary disposition against D'Agostini, finding that plaintiff had presented evidence showing that D'Agostini possessed and controlled the reservoir on the date of the accident because the city relinquished its control on November 13, 2000 after draining most of the water from the reservoir. Again, the court observed that D'Agostini was contractually responsible for all aspects of the project, including overall job safety, particularly after creating an opening in the reservoir's wall permitting entry inside.

Finally, the trial court granted the request of plaintiff's counsel to preclude defendants from naming the city as a nonparty at fault because the city was immune from tort liability.

On April 1, 2004, the trial court entered three separate orders implementing its various rulings. D'Agostini and G&H moved for reconsideration, which motions the trial court denied. This Court granted defendants' applications for leave to appeal, and consolidated these appeals.

## II. Standard of Review

We review de novo a trial court's decision to grant or deny summary disposition to determine if a party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. Both the trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id.* at 120-121. Summary disposition is proper if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

We also review de novo questions of law, including whether a party has a duty of care giving rise to a tort action for negligence upon its breach. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

## III. Docket No. 256921 (G&H)

We find that the trial court erred by not granting summary disposition in favor of G&H. In general, a subcontractor has no duty to maintain a reasonably safe workplace for employees of other subcontractors. "At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari v Turner Constr Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). But in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974) our Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of nonliability in cases involving construction projects. This exception, however, does not extend to cases where an employee of a subcontractor injured at a worksite seeks to recover from another subcontractor working on the same general project. *Id.* at 104, n 6; *Klovski v Martin Fireproofing Corp*, 363 Mich 1; 108 NW2d 887 (1961). Rather, a construction employee's immediate employer is generally responsible for job safety. *Johnson v A & M Custom Built*

*Homes of West Bloomfield, LPC*, 261 Mich App 719; 683 NW2d 229 (2004); *Hughes v PMG Building, Inc.*, 227 Mich App 1, 12; 574 NW2d 691 (1997). We conclude these same principles apply here where the G&H is a subcontractor of NTH.

Nevertheless, there are situations where a subcontractor may incur liability for a workplace injury of another subcontractor's employee. For example, liability may arise when a subcontractor owns the instrumentality causing injury to an employee of another subcontractor at the workplace. *Ghaffari, supra* at 30-31 (the plaintiff tripped on pipes allegedly owned by the defendant subcontractor). Further, when a subcontractor creates a hazardous condition, it may be liable for injuries the hazard causes to an employee of another subcontractor. *Johnson, supra* at 723 (the plaintiff alleged a subcontractor improperly installed roofing toe boards that gave way causing the plaintiff to fall). The *Johnson* Court analyzed the plaintiff's claim as one of active negligence.<sup>3</sup> *Id.* at 723. Regardless of whether a subcontractor has a direct duty to maintain a safe workplace, "as between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally." *Id.*, quoting 65A CJS § 534 p 291.

Here, G&H did not own or create the sump pit into which plaintiff fell. Accordingly, the trial court misapplied *Munson, supra*. In that case, the subcontractor both owned and created the hazard that caused the plaintiff's injury, a defectively assembled scaffold that the defendant left at a job site. *Id.* at 384. Because it is undisputed that G&H was only a subcontractor to NTH, and therefore, not responsible for overall workplace safety, and because plaintiff has not alleged, nor factually supported a claim that G&H was actively negligent, the trial court erred by not granting summary disposition in favor of G&H. *Ghaffari, supra* at 31, n 7.

#### IV. Docket No. 256941 (D'Agostini)

To establish liability under the common work area doctrine, plaintiff must produce evidence that (1) D'Agostini failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. *Ormsby, supra* at 54. A failure to establish any one of these four elements is fatal to a plaintiff's common work area claim. *Id.* at 59, n 11. Here, D'Agostini only contests the first element, arguing on appeal that the undisputed evidence establishes as a matter of law that it did not have supervisory and coordinating authority over the work of NTH and G&H.

Specifically, D'Agostini argues that it was not the general contractor with respect to the work being performed by NTH, nor did it possess or control the premises where the injury occurred. Rather, D'Agostini contends that the city was the property possessor, owner, and general contractor for the pumping station improvement project and for the survey work the city

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<sup>3</sup> "The general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project, is well settled." *Clark v Dalman*, 379 Mich 251, 262; 150 NW2d 755 (1967).

contracted with NTH to perform. D'Agostini claims that because it had the same subcontractor relationship to the city as NTH, a duty of care did not arise under the common work area doctrine to employees of NTH. Instead, the duty to guard against readily observable and avoidable dangers rested with NTH as plaintiff's employer, and the city as the property owner and general contractor to NTH. Defendant's argument has superficial merit.

Plaintiff does not dispute that the city, not D'Agostini, contracted with NTH, and that NTH subcontracted with G&H to conduct a survey of the pumping station reservoir. It is also undisputed that D'Agostini's contract with the city did not include the survey of the reservoir that NTH and G&H employees were performing when plaintiff fell into the sump pit inside the reservoir. D'Agostini's contract with the city, as it existed before the accident, required D'Agostini to install a 108-inch water main inside the reservoir. D'Agostini was not scheduled to perform this work until January 2001. In addition, after the city drained the reservoir of all but six inches of water, D'Agostini inspected its inside and found possible structural integrity problems and physical impediments that precluded D'Agostini from proceeding with its planned installation of the 108-inch water main inside the reservoir.

Furthermore, in its contract with D'Agostini, the city reserved the right to contract directly with other parties for other work related to the pumping station improvement project, such as the DWSD contract with NTH. Indeed, both DWSD general superintendent of engineering DeRiemaker, as well as DWSD field engineer and the pumping station improvement project manager, Ramesh Shukla, acknowledged that the city bypassed D'Agostini to save time and money. Shukla testified that it was "cheaper to go through NTH directly rather than go through D'Agostini . . . because if NTH goes to D'Agostini there's an additional overhead and profit" for the city to pay D'Agostini. Thus, D'Agostini argues it had no contractual, monetary, or other supervisory control over the work of NTH and G&H was performing when plaintiff was injured. Because it lacked supervisory and coordinating authority over NTH and G&H, D'Agostini asserts it was not the general contractor under the common work area doctrine.

Plaintiff, on the other hand, forcefully argues that it is disingenuous for D'Agostini to assert it is the general contractor for most of the pumping station improvement project, but not all the work in connection with that project. Plaintiff contends that D'Agostini's reliance on the terms of its contract with the city and the contractual relationships among the parties is misplaced because plaintiff's claim is not contractual; it is based on common law tort liability. Moreover, plaintiff asserts, D'Agostini's contract with the city is replete with provisions making D'Agostini responsible for the safety of the project at the job site. Further, D'Agostini has not appealed the trial court's ruling that D'Agostini controlled the interior of the reservoir where the accident occurred. Plaintiff points to language about the common work area doctrine that originated in *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996), and that this Court applied it in *Johnson, supra* at 721, and *Hughes, supra* at 6. Specifically, the first element of general contractor liability under the common work area doctrine pertains to geographic work location. Justice Brickley, in *Groncki*, restated the four elements of the common work area doctrine under *Funk*: "1) a general contractor with supervisory and coordinating authority *over the job site*, 2) a common work area shared by the employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers." *Groncki, supra* at 662 (emphasis added).

Plaintiff's reliance on Justice Brickley's restatement of *Funk* is misplaced. The geographic location element of the common work area doctrine is found in the doctrine's namesake second element, not its first. In *Hughes*, this Court discussed how the location of a workplace accident can affect liability:

We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." [*Hughes, supra* at 8-9, quoting *Funk, supra* at 104.]

Our Supreme Court recently approved this Court's statement in *Hughes*. *Ormsby, supra* at 57, n 9. The Court also noted that *Gronki* was a non-binding plurality opinion. *Id.* at 56, n 8. Even so, Justice Brickley recognized that supervisory control was the focus of *Funk*'s first element, noting, "[t]he mere presence of a common work area, *without supervisory control by the general contractor* and a readily observable and avoidable risk to a significant number of workers, will not necessarily impose liability. *Groncki, supra* at 663 (emphasis added).

Thus, to establish liability under the common work area doctrine, plaintiff must show that "(1) the defendant, . . . *general contractor, failed to take reasonable steps within its supervisory and coordinating authority* (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ghaffari, supra* at 21, quoting *Ormsby, supra* at 54 (emphasis altered).

After careful consideration of the party's arguments and the record below, we conclude that evidence exists from which the trier of fact could find that D'Agostini possessed supervisory and coordinating authority over both the work site where the accident occurred and the work being performed by NTH and G&H. First, the city had drained the water from the reservoir, turned off the pumps, and granted D'Agostini access to the reservoir for the purpose of performing its contract work inside. Second, in his letter to DeRiemaker dated November 16, 2000, it was Nichols who suggested the work being performed by NTH and G&H when he wrote that the city should "have [its] experts look at the reservoir before [D'Agostini] start all the work inside." Third, it is undisputed that the reservoir survey and structural changes that might be recommended on the basis of the survey were necessary for D'Agostini to complete its contract obligations. Finally, D'Agostini's contract with the city explicitly required D'Agostini be responsible for coordinating and supervising ancillary "other work" necessary for the project.

Article 13 of the D'Agostini's contract with the city, titled "Related Work at Site," in pertinent part provides:

13.1.1. During the period allowed for performance and completion of the work, the **Owner** may perform other work at the site with its own forces, or have other work performed by other parties (including, but not limited to other contractors or public utilities). . . .

13.1.2. The **Contractor** shall afford each other party (or the **Owner** when performing other work) *proper and safe access to the site* and a reasonable opportunity for the handling, unloading and storage of materials and equipment and for the execution of their work, and shall properly connect and coordinate the Work with theirs. . . .

13.1.3. If any part of the Work depends for proper execution or results on the work of the **Owner** or another party, the **Contractor** *shall inspect* and promptly report to the **Engineer** in writing conditions in that work that render it unavailable or unsuitable for proper execution and results. . . .

13.1.4. Whenever Work to be performed by the **Contractor** is dependent upon the work of other parties, the **Contractor** *shall coordinate that work with the dependent work to the same extent that the Contractor is required to coordinate dependent subcontractor work*. . . .

13.1.5. If the **Owner** contracts with other parties for other work, the **Engineer** will have the authority and responsibility for coordinating the activities of the **Contractor** and those parties, unless another person or organization with specific authority and responsibility for coordination of the activities of the **Contractor** and those parties is expressly designated in the Supplementary Conditions or at the pre-construction conference.

13.1.6. If the **Owner** contracts with other parties for other work the **Contractor** *shall be responsible for cooperating with the Engineer fully in the coordination of the Contractor's Submittals with dependent Submittals of those other parties whose work in any way relates or depends upon the Work, or vice versa.* [DWSD Contract No. DWS-812, Imlay Station Improvements, 00700-29/30; (Italics added).]

Although the parties may dispute the meaning and application of these contract provisions, a jury could find that they, together with the other pertinent evidence noted already, proved that D'Agostini possessed supervisory and coordinating authority over the "other work" being performed by NTH and G&H that was necessary for the pumping station improvement project. Accordingly, we find that the trial court correctly determined that material issues of fact remain whether D'Agostini failed to take reasonable steps within its supervisory and coordinating authority, the first element of tort liability under the common work area doctrine. D'Agostini has not appealed the trial court's determination that material issues of fact exist regarding the other three elements of the common work area doctrine. Therefore, we accept the trial court's determinations in that regard without expressing any opinion. We also express no opinion regarding alternate theories of liability plaintiff advances that the trial court has not ruled on. Because issues of material fact remain regarding the first element plaintiff must establish to impose tort liability on D'Agostini under the common work area doctrine, D'Agostini was not

entitled to judgment as a matter of law. *Maiden, supra* at 120. We affirm the trial court's denial of D'Agostini's motion for summary disposition as to this theory.

Next, D'Agostini argues that the decision of the city and NTH to work inside the reservoir without guarding the known sump pits inside was unforeseeable, intervening negligence precluding a finding that any negligence by D'Agostini proximately caused plaintiff's injuries.<sup>4</sup> We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). The causation element requires proof of both cause in fact and proximate cause. *Id.* at 310; *Skinner, supra* at 162-163. Cause in fact requires that a plaintiff establish that the claimed injuries would not have occurred but for defendants' conduct. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). In general, proximate cause involves whether the consequences of the defendant's conduct were foreseeable and whether a defendant should be held legally responsible for such consequences. *Id.* Proximate cause is that which, in a natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985); *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). There may be more than one proximate cause of an injury, and when several factors contribute to produce an injury, "one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury." *Brisboy v Fibreboard Corp*, 429 Mich 540, 547, 418 NW2d 650 (1988). Whether a defendant's conduct is a proximate cause of a plaintiff's injuries will be a factual question for the factfinder to decide, unless reasonable minds could not differ. Then, the court should decide the issue as a matter of law. *Babula, supra* at 54; *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

Thus, in general, whether an intervening act is a superseding cause that relieves a defendant from liability will be a question for the trier of fact. *Meek v Dep't of Transportation*,

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<sup>4</sup> We note that although D'Agostini argues proximate causation, whether the circumstances resulting in injury are foreseeable is also closely related to the existence of a duty of care. "[T]he question of proximate cause has been characterized as 'a policy question often indistinguishable from the duty question.'" *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995), quoting *Moning v Alfano*, 400 Mich 425, 438; 254 NW2d 759 (1977). The factors a court may consider when addressing the question of duty include: "the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and injury, the moral blame attached to the conduct, the policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." *Babula, supra* at 53. Here, our Supreme Court has already determined a general contractor under the circumstances of this case owes a duty of care under the common work area doctrine to ensure that subcontractors take appropriate safety precautions for worker safety. "Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Funk, supra* at 104.

240 Mich App 105, 118; 610 NW2d 250 (2000). But under the circumstances of this case, D'Agostini's argument that the negligence of others in not guarding against the sump pit hazards was unforeseen, and therefore, a superceding cause, fails as a matter of law. The parties recognize that for an intervening cause to be a superseding cause relieving defendant of liability, it must not be reasonably foreseeable. *Id.* at 120. Here, however, plaintiff alleges D'Agostini negligently failed to guard against the hazard resulting in plaintiff's injury. "Where the defendant's negligence consist[s] of enhancing the likelihood that the intervening cause would occur or consist[s] of a failure to protect the plaintiff against the risk that occurred, the intervening cause was reasonably foreseeable." *Id.* at 120-121, citing *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 438 (Brickley, J.), 447 (Riley, J.); 487 NW2d 106 (1992), amended 440 Mich 1203 (1992). Accordingly, D'Agostini's argument that it is entitled to judgment as a matter of law fails. Whether D'Agostini breached its duty of care under the common work area doctrine, and, if such breach was cause in fact and a proximate cause of a plaintiff's injuries, are questions for the trier of fact resolve. *Babula, supra* at 54; *Nichols, supra* at 532.

#### V. Nonparty At Fault

After the city was dismissed from this lawsuit on the basis of governmental immunity, plaintiff requested and received an order from the trial court precluding defendants from noticing the city as a nonparty at fault pursuant to MCL 600.2957 and MCL 600.6304. Plaintiff based his request on *Jones v Enertel, Inc*, 254 Mich App 432, 438; 656 NW2d 870 (2002), which held that absent a legal duty to a plaintiff, a nonparty could not be named as a nonparty at fault in a negligence action. Plaintiff now concedes that to the extent the trial court dismissed plaintiff's claims against the city on the basis of governmental immunity, the trial court erred by precluding defendants from naming the city as a nonparty at fault.

In general, in actions seeking damages for wrongful death, personal injury, and property damage, the Legislature has replaced the common-law doctrine of joint and several liability among multiple responsible parties with the doctrine of several liability. MCL 600.2956; MCL 600.6304(4); *Jones, supra* at 435. Where the factfinder determines the "fault" of multiple parties proximately caused the damage the plaintiff sustained, each defendant is responsible for paying only that part of the plaintiff's damages attributable to its proportionate percentage of fault or so-called "fair share." MCL 600.2957(1); MCL 600.6304(4), (8); *Jones, supra* at 435, citing *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). The Legislature has broadly defined "fault" to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability." Importantly, this statutory "fair share" scheme requires the factfinder to assess the fault of all parties that contributed to the plaintiff's injury, property damage, or death, "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1); MCL 600.6304(1)(b); *Kopp v Zigich*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (No. 254155, September 22, 2005), slip op at 2. Moreover, the determination or assessment of a percentage of fault to a nonparty does not affect the availability of a defense or immunity otherwise accorded that person, and "a finding of fault does not subject the nonparty to liability." MCL 600.2957(3). Therefore, the trial court erred by precluding defendants from naming the city as a nonparty at fault. MCL 600.2957(2); MCR 2.112(K).

We also conclude that the trial court abused its discretion by determining that defendants' notices on its motions for reconsideration were untimely. In general, a notice of nonparty fault must be given within 91 days after the party against whom a claim is asserted files its first responsive pleading. MCR 2.112(K)(2), (3)(c). But, a later filing "shall" be permitted upon a "showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party." MCR 2.112(K)(3)(c). Here, defendants gave notice as soon as the trial court granted the city's motion for summary disposition. Thus, defendants could not have given notice any sooner than they did because, until that point, the city was a named party in the lawsuit. Moreover, plaintiff can hardly claim unfair prejudice or surprise when he had named the city as a defendant in his complaint.

#### VI. Conclusion

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Jane E. Markey

**EXHIBIT 34**

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May 20, 2014

Page 1

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

RONNIE DANCER AND ANNETTE  
DANCER,

Plaintiffs,

vs.

Case No. 2012 0571 NO

Hon. Pamela Lightvoet

CLARK CONSTRUCTION COMPANY,  
INC., A MICHIGAN CORPORATION,  
AND BETTER BUILT CONSTRUCTION  
SERVICES, INC., A FOREIGN  
CORPORATION,

Defendants.

\_\_\_\_\_/

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The Deposition of TOM DESTAFNEY,  
Taken at 1050 Wilshire Drive, #320,  
Troy, Michigan,  
Commencing at 9:30 a.m.,  
Tuesday, May 20, 2014,  
Before Cynthia A. Montgomery, CSR-6473.

Tom Destafney  
May 20, 2014

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES: 2 BRIAN J. BENNER 3 Benner &amp; Foran, PC 4 28116 Orchard Lake Road 5 Farmington Hills, Michigan 48334 6 Appearing on behalf of the Plaintiff. 7 8 TYREN R. CUDNEY 9 Lennon. Miller, O'Connor &amp; Bartoziewicz, PLC 10 900 Comerica Building 11 Kalamazoo, Michigan 49007 12 Appearing on behalf of Defendant, 13 Better Built. 14 LARRY W. DAVIDSON 15 Harvey Kruse PC 16 1050 Wilshire Drive, #320 17 Troy, Michigan 48084 18 Appearing on behalf of Defendant, 19 Clark. 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 Troy, Michigan 2 Tuesday, May 20, 2014 3 9:30 a.m. 4 (Exhibit No. 1 marked for 5 identification.) 6 TOM DESTAFNEY, 7 was thereupon called as a witness herein, 8 and after having first been duly sworn to testify to 9 the truth, the whole truth and nothing but the 10 truth, was examined and testified as follows: 11 EXAMINATION BY MR. BENNER: 12 Q This is the discovery deposition of Tom 13 Destafney being taken pursuant to Notice. 14 Mr. Destafney, my name is Brian Benner; I represent 15 the plaintiffs Ronnie Dancer and Annette Dancer. 16 I'm going to be asking you a series of questions. 17 If you don't understand one of the questions will 18 you please tell me? 19 A Sure, yes. 20 Q Then we will rephrase the question. If 21 you answer the question we shall all assume that you 22 understood the meaning of the question, all right? 23 A Correct thus far. 24 Q That's fair? 25 A That's fair.</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX 2 3 4 Witness Page 5 TOM DESTAFNEY 6 7 EXAMINATION 8 BY MR. BENNER:.....4 9 INDEX TO EXHIBITS 10 Exhibit Page 11 (Exhibit attached to transcript.) 12 EXHIBIT NO. 1 (Notice).....4 13 EXHIBIT NO. 2 (CV).....6 14 EXHIBIT NO. 3 (Index).....6 15 EXHIBIT NO. 4 (Case list).....11 16 EXHIBIT NO. 5 (Opinions).....18 17 EXHIBIT NO. 6 (Photos).....85 18 EXHIBIT NO. 7 (Hydromobile excerpts).....115 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 Q Would you please state your name for the 2 record. 3 A Thomas Michael Destafney, 4 D-E-S-T-A-F-N-E-Y. 5 Q I've marked the deposition duces tecum 6 notice as Exhibit One. Do you have your curriculum 7 vitae with you? 8 A I do. In fact, you got a copy in that or 9 I could pull one out. 10 (Exhibit No. 2 marked for 11 identification.) 12 BY MR. BENNER: 13 Q In preparation for today's deposition can 14 you tell me what you reviewed? 15 A Well, the file I have which I have on a CD 16 in my notebook, it's got all the documents that I 17 reviewed. There's a list in that folder that 18 Mr. Davidson left for you that's got the inventory 19 of what's in my notebook. My file -- I can run 20 through that list if you want. 21 Q Sure. Well, this is what we're talking 22 about. 23 A The list in front of you though really is 24 an inventory of what's in this notebook. In 25 addition too, I brought you a CD-ROM that's got</p>

2 (Pages 2 to 5)

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<p style="text-align: right;">Page 6</p> <p>1 everything I reviewed. In here you won't find 2 interrogatories, you won't find pleadings; the 3 Complaint's in here. These are things primarily 4 that I generated. So I'm not sure. 5 (Exhibit No. 3 marked for 6 identification. 7 BY MR. BENNER: 8 Q I'm going to show you what's been marked 9 as Exhibit Number Three, if you can identify that? 10 A Sure. This is the deposition index for 11 today's deposition of this white notebook, about a 12 3-inch binder that I brought this morning. 13 Q In just looking at your dep summaries -- 14 we have taken so many depositions I might have 15 forgotten -- who's Dennis Collins? 16 MR. DAVIDSON: MIOSHA. 17 BY MR. BENNER: 18 Q In addition to Exhibit Number Three you 19 were telling me you had other things? 20 A Yes, sir. On the CD-ROM there would be 21 any of the -- there are some interrogatories there, 22 pleadings. I've also reviewed portions of the state 23 law, OSHA, MIOSHA; I've looked at portions of the 24 385, that would be the Army Manual Safety Guide. 25 I've looked at portions of the</p>	<p style="text-align: right;">Page 8</p> <p>1 engineers of various disciplines that investigate 2 things that, to put it in most common language, 3 things that have gone badly. 4 Q Is this for litigation purposes? 5 A Some of it is, yes. 6 Q What isn't for litigation purposes? 7 A The portion of the work that wouldn't be 8 for litigation would be some of the cases that we 9 work on are directly for the insurance carriers, 10 which may ultimately wind up in litigation but at 11 the time we're working on it it's directly for a 12 carrier. 13 Q How much of your work is done for 14 insurance carriers? 15 A Me personally or the company? 16 Q Let's start with the company. 17 A Probably about the same split either way 18 you look at it but it's approximately 20 to 19 25 percent would be for insurance, the insurance 20 world directly. And the balance of that would be 21 cases in litigation. 22 Q How much would that be for the defense? 23 A Defense cases for me and for the company 24 would be somewhere around the order of 20 to 25 25 percent plaintiff and 70 to -- 75 to 80 percent</p>
<p style="text-align: right;">Page 7</p> <p>1 federal OSHA and of course, all the exhibits that 2 went with those depositions as well. Everything 3 should be on the CD-ROM that I've got right here. 4 Q Who are you presently employed by? 5 A CED Technologies Incorporated. 6 Q What does that company do? 7 A Forensic engineering. 8 Q Where are they located? 9 A In various locations. 10 Q Where is the main office? 11 A Annapolis, Maryland. 12 Q You've been employed by them since 1998? 13 A Full-time since 1999, correct. 14 Q Do you have any ownership interest in CED 15 Technologies? 16 A No. 17 Q You don't have any shares of stocks or 18 anything? 19 A No. 20 Q What does CED Technologies do? 21 A Just as I said, it's a forensic 22 engineering company. 23 Q When you say "forensic engineering" what 24 do you mean by that? 25 A It's a company that's composed of</p>	<p style="text-align: right;">Page 9</p> <p>1 defense; it's heavily defense. 2 Q How much of your work is for the defense? 3 A Those numbers would pertain to me also 4 approximately. 5 Q Seventy to 80 percent of your work would 6 be for the defense? 7 A Correct. 8 Q Would the other 20 to 25 percent be for 9 the insurance companies? 10 A No. The split I gave you on the 75 to 11 80 percent would be for those cases that are in 12 litigation. In the insurance world it's typically 13 we are working for USAA and they want us to 14 investigate a claim before they pay or not on that 15 claim. But there are typically no lawyers involved 16 in those. 17 Q Seventy to 80 percent of the work you do 18 is in litigations for the defense, right? 19 A Of the cases in litigation, yes. 20 Q Are you saying somewhere between 20 and 21 30 percent are for the plaintiffs? 22 A It's going to be more like 20 to 23 25 percent would be plaintiff cases of those cases 24 in litigation. 25 Q Are plaintiffs actually injured parties or</p>

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<p style="text-align: right;">Page 10</p> <p>1 just the person suing which might be a company?</p> <p>2 A It could be either one.</p> <p>3 Q Out of the 20 to 25 percent how much of</p> <p>4 that is for people that were actually injured like</p> <p>5 Ronnie Dancer?</p> <p>6 A I don't know.</p> <p>7 Q Five percent?</p> <p>8 A I don't know, I couldn't tell you. It</p> <p>9 would be a wild guess.</p> <p>10 Q I'll take a wild guess.</p> <p>11 MR. CUDNEY: I'll object to speculation.</p> <p>12 THE WITNESS: I guess maybe the best way</p> <p>13 to answer it would be those cases, plaintiff</p> <p>14 cases, are typically either someone's an</p> <p>15 injured party, not unlike Mr. Dancer or an</p> <p>16 entity such as, say a condominium association</p> <p>17 that feels damaged as a result of poor</p> <p>18 construction or alleged poor construction by a</p> <p>19 contractor.</p> <p>20 So it runs -- probably more the plaintiff</p> <p>21 cases are an injured individual than the</p> <p>22 injured, if you will, entity. But I don't</p> <p>23 know, I don't know how to -- it would be a real</p> <p>24 wild guess for me to split that up for you.</p> <p>25 BY MR. BENNER:</p>	<p style="text-align: right;">Page 12</p> <p>1 Harvey Kruse law firm?</p> <p>2 A No.</p> <p>3 Q How much are you being paid an hour for</p> <p>4 your work in this matter?</p> <p>5 A Two ninety-five per hour and that would be</p> <p>6 the company being paid 295 per hour, not me</p> <p>7 personally.</p> <p>8 Q Does that change for travel or for</p> <p>9 deposition or for trial?</p> <p>10 A No.</p> <p>11 Q Just a flat 295?</p> <p>12 A It is, correct.</p> <p>13 Q Do you bill from portal to portal when</p> <p>14 you're flying on the 295?</p> <p>15 A Yes.</p> <p>16 Q Would you bill 24 hours for being up here?</p> <p>17 A Oh, no. You mean while I'm sleeping in a</p> <p>18 hotel?</p> <p>19 Q Yeah.</p> <p>20 A No, absolutely not.</p> <p>21 Q How do you describe "portal to portal"?</p> <p>22 A When I hit the hotel the clock stops and</p> <p>23 when I leave the hotel in the morning the clock</p> <p>24 starts, it's just a general description.</p> <p>25 Q From the time you leave your house to get</p>
<p style="text-align: right;">Page 11</p> <p>1 Q I'll still take a wild guess.</p> <p>2 A Probably a 60 percent or so, it's going to</p> <p>3 be more than half would be an injured party based on</p> <p>4 your descriptions, say of Mr. Dancer.</p> <p>5 Q Number Six asked you to bring a list of</p> <p>6 cases that you've been retained as an expert.</p> <p>7 A It's unreasonable to ask me to bring every</p> <p>8 case I've ever worked on. I did bring you a list of</p> <p>9 all cases that I've testified -- either a trial,</p> <p>10 deposition or arbitration since March 1st of 1999</p> <p>11 and that's in your folder there. If I testified in</p> <p>12 a case it's on that list.</p> <p>13 Q Is this the list?</p> <p>14 A Correct.</p> <p>15 (Exhibit No. 4 marked for</p> <p>16 identification.)</p> <p>17 BY MR. BENNER:</p> <p>18 Q I'm going to show you what's been marked</p> <p>19 as Exhibit Number Four and if you can tell me what</p> <p>20 it is.</p> <p>21 A This is a list of all cases that I've</p> <p>22 worked on at CED since I became employed there</p> <p>23 1 March 1999 where I testified either at deposition,</p> <p>24 trial or arbitration.</p> <p>25 Q Have you ever testified before for the</p>	<p style="text-align: right;">Page 13</p> <p>1 on the plane to come here you would be billing and</p> <p>2 then once you got to the hotel you would stop?</p> <p>3 A No, it would be from the time I left the</p> <p>4 office. My house is further from the airport so</p> <p>5 it's less. But it would be really the time from the</p> <p>6 office to the airport.</p> <p>7 Q Then once you got to the hotel you'd stop</p> <p>8 and once you left the hotel you'd start again?</p> <p>9 A Correct.</p> <p>10 Q How many times have you testified in</p> <p>11 scaffolding cases?</p> <p>12 A I'd have to go through that list to answer</p> <p>13 that. I don't know.</p> <p>14 Q Are we talking about once or ten?</p> <p>15 A It hasn't been a lot in terms of scaffold.</p> <p>16 There are some scaffold-related cases in there.</p> <p>17 It's probably less than five.</p> <p>18 Q How about Hydromobile cases?</p> <p>19 A None.</p> <p>20 Q In the scaffolding-type cases were they</p> <p>21 all for the defense?</p> <p>22 A I don't recall without --</p> <p>23 Q Want to take a quick look?</p> <p>24 A Sure. To answer your question, based on</p> <p>25 my quick review it looks like there is just one</p>

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<p style="text-align: right;">Page 14</p> <p>1 that's scaffold-related and it was a defense case so 2 it would be 100 percent. 3 Q What's the name of that case? 4 A That case is Yiannouris, 5 Y-I-A-N-N-O-U-R-I-S versus Cianbro, C-I-A-N-B-R-O 6 Construction et al. That's in the Superior Court 7 for the District of Columbia. 8 Q Which state? 9 A It's not, D.C. 10 Q What year was that? 11 A That was 2002. 12 Q Were you in the Navy? 13 A Yes. 14 Q What years were that? 15 A It was 1979 to 1999. 16 Q So I assume you retired from the Navy, 17 right? 18 A I did, right. 19 Q You're not an Annapolis grad though, 20 correct? 21 A No, I'm not. 22 Q What did you predominately do in the Navy, 23 construction? 24 A Not every one of my billets was 25 construction but primarily it was overseeing</p>	<p style="text-align: right;">Page 16</p> <p>1 controlling source for safety? 2 A I couldn't say 99 percent but a high 3 percentage, yes. 4 Q Plus -- how about an excess of 90 percent? 5 A I don't know that either. I don't know, 6 are you talking dollar amount or are you talking 7 number of contracts? 8 Q I'm talking number of contracts -- number 9 of jobs. I'm not talking dollar amount. 10 A Number of jobs, it probably -- it's in the 11 90s, yes. 12 Q Have you actually gone out to the Fort 13 Custer job site at all? 14 A No. 15 Q Have you ever worked with Clark 16 Construction or testified for them in any capacity? 17 A Worked with them indirectly, yes. 18 Q How was that? 19 A If you look at my last billet I had in the 20 Navy it was at the Navy's -- in D.C. they have an 21 intelligence arm, it's called the "Office of Naval 22 Intelligence" and I was their public works officer 23 slash construction manager. 24 Clark built the facility there. It's 25 a very large million-square-foot facility and there</p>
<p style="text-align: right;">Page 15</p> <p>1 construction. 2 Q Would it be fair to say you are familiar 3 with E 385? 4 A Yes. 5 Q Would E 385 been used on all the 6 construction jobs you did for the Navy? 7 A I don't know, I can't remember. 8 Q Why wouldn't E 385 be the controlling 9 safety source on all construction jobs you did for 10 the Navy? 11 A Because I can't recall. I did some work, 12 if you look at that list, the Palau Islands, 13 P-A-L-A-U, where we built -- oversaw the 14 construction of an airport complex and some roads 15 and power plants and basic infrastructure. I can't 16 recall if the 385 was our overarching safety 17 document on that. 18 It was an unusual contract in that it 19 was a foreign joint venture out of New Zealand and I 20 can't recall if we were using the 385 or OSHA 1926. 21 It was one of those two and I just don't remember 22 which one it was. Other than that the 385 would 23 have applied. 24 Q Would it be fair to say, like 99 percent 25 of the job sites E 385 would have been the</p>	<p style="text-align: right;">Page 17</p> <p>1 was some warranty issues that were nagging and 2 lagging that they were continuing to work on while I 3 was there. So it wasn't a direct contract 4 relationship but they were there to do warranty 5 repairs. 6 Q Do you remember working with anybody 7 directly there? 8 A At Clark? 9 Q Yeah. 10 A No. 11 Q Have you done any work for Better Built? 12 A No. 13 Q Have you reviewed the Hydromobile owners 14 and users manuals? 15 A I've looked at what I believe is the -- I 16 can't remember if it's the owners or the users, I 17 believe it's the owners manual -- but a cursory look 18 at that, yes. I've not reviewed every page of that 19 document. 20 Q Do you know which Hydromobile manual that 21 you reviewed? 22 A I don't know. 23 Q Would you have a record of that some 24 place? 25 A Yeah, I have the manual that I looked at</p>

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<p style="text-align: right;">Page 18</p> <p>1 in my office. I think it was the -- I think they 2 have -- is this the I believe the M2 model? It's 3 the model I believe we're talking about in this 4 case. 5 Q Can you tell me what your opinions are in 6 this matter. 7 A Sure. Those are provided for you in that 8 folder as well. 9 Q It's this three-page document? 10 A I think it was three, yes. 11 (Exhibit No. 5 marked for 12 identification.) 13 BY MR. BENNER: 14 Q I'm going to show you Deposition Exhibit 15 Number Five, if you could just identify it. 16 A These are 11 opinions that I've 17 handwritten in this case. 18 Q In preparation for today's deposition can 19 you tell me you who you met with? 20 A With Mr. Davidson. 21 Q Anybody else? 22 A No. 23 Q Have you ever spoken directly to anybody 24 from Better Built? 25 A No.</p>	<p style="text-align: right;">Page 20</p> <p>1 Q Your opinion number three is? 2 A "By virtue of his training and experience 3 Ronnie Dancer knew or should have known of the 4 potential to be injured that was created by his 5 improper placement of the scaffold planks on 6 August 9, 2010." 7 Q Your opinion number four is? 8 A "Ronnie Dancer's actions violated MIOSHA's 9 basic fall protection rules for construction and 10 that he was not protected from falling by a 11 guardrail system, safety net or a personal fall 12 protection system while the scaffold was greater 13 than 10 feet above a lower level and by creating an 14 unsafe and unstable walking slash working surface." 15 Q Your opinion number five is? 16 A "There is no evidence that on 17 August 9, 2010 that any trade other than Leidal-Hart 18 was in control over and working on the scaffold." 19 Q Your opinion number six is? 20 A "On August 9, 2010 Leidal-Hart was the 21 controlling employer for the scaffold zone and that 22 Leidal-Hart owned the scaffold and used it for its 23 own work." 24 Q Your opinion number seven is? 25 A "Leidal-Hart created the hazard that</p>
<p style="text-align: right;">Page 19</p> <p>1 Q Have you ever spoken directly to anybody 2 from Clark? 3 A In this case? 4 Q Yes. 5 A No. 6 Q Why don't we start with the first of your 7 11 opinions. 8 A Okay. Is that a question? 9 Q My question is: Would you please tell me 10 the first of your 11 opinions. 11 A Sure. I'll just read into the record, if 12 that's okay? 13 Q Sure. 14 A "Number one. On August 9, 2010 Ronnie 15 Dancer violated the MIOSHA Act of 1975 by ignoring 16 his knowledge, training, and awareness that he 17 should be protected from falling while he was 18 removing and replacing the work platform planking to 19 raise the scaffold, resulting in his fallen 20 injuries." 21 Q Your second opinion? 22 A "On August 9, 2010, based on his training 23 and experience Ronnie Dancer was a competent person 24 with respect to the erection, use, and disassembly 25 of the scaffolding."</p>	<p style="text-align: right;">Page 21</p> <p>1 injured Ronnie Dancer, exposed only its own 2 employees to the hazard and had a responsibility to 3 correct the same." 4 Q Your opinion number eight is? 5 A "Leidal-Hart was responsible for the 6 selection of the means and methods used to conduct 7 its work and for conducting those means and methods 8 in accordance with MIOSHA, the EM 385, the Activity 9 Hazard Analysis, AHA, and any other pertinent 10 standards." 11 Q Number nine, your opinion is? 12 A "It would be unreasonable to expect the 13 general contractor to have detected isolated 14 discreet event of Ronnie Dancer and properly placing 15 the planks on the work platform on August 9, 2010." 16 Q Your opinion number ten is? 17 A "It was reasonable for the general 18 contractor to expect that Leidal-Hart would conform 19 to MIOSHA, the EM 385, its own safety policy, and 20 the AHA during the erection, use, and raising of the 21 scaffold." 22 Q And your opinion number 11 is? 23 A "There are no acts or omissions on the 24 part of the general contractor that caused or 25 contributed to Mr. Dancer's accident."</p>

6 (Pages 18 to 21)

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<p style="text-align: right;">Page 22</p> <p>1 By the way, I do want to add, this 2 may not be an all-inclusive list. As we go through 3 the deposition today I do want to hold the -- or put 4 out the possibility that I may add to this list or 5 that I may add to the list in the future based on 6 the receipt of additional information. So this may 7 or may not be an all-inclusive list that I've got in 8 front of me today, in front of you. 9 Q What additional information do you think 10 you're going to receive that would affect your 11 opinion? 12 A I don't know. Depositions, I believe, are 13 still in progress. I would expect to get a few more 14 depo transcripts. There's in -- one of the depos I 15 just read, Mr. Wright's, and the other -- one of the 16 defense experts, there was discussions of a 30,000 17 treasure trove page, treasure trove of documents. I 18 don't know what of that would come my way but 19 there's a possibility some of those documents would 20 come to me. 21 Q Who is the last plaintiff's lawyer you've 22 testified for on a personal injury case such as 23 somebody like Ronnie Dancer being injured? Take a 24 look at your list. 25 A On my list would be page 5, it would be</p>	<p style="text-align: right;">Page 24</p> <p>1 Q Is that a problem? 2 MR. DAVIDSON: Mr. Benner, so that we 3 don't forget, if you would put that request to 4 me in writing, that way we'll all remember? 5 MR. BENNER: Sure. 6 BY MR. BENNER: 7 Q The rest of the package that your lawyer 8 supplied me with, is this the deposition outlines; 9 would that be correct? 10 A The one on top is an outline and there's 11 probably more of those. 12 Q There's an outline -- why don't you maybe 13 just read into the record what deposition 14 transcripts' outlines that you gave to me. 15 A Dennis Collins; John Stewart; Karen 16 Halsey; Nicholas Martin; Robert Dowding; Brad 17 Leidal, L-E-I-D-A-L; Cory Hanson, Eric Koshurin, 18 K-O-S-H-U-R-I-N; Glen Johnson, no T; Jim Schaibly, 19 S-C-H-A-I-B-L-Y; Paul Clark; Tammie Waterman; Troy 20 Moulton, M-O-U-L-T-O-N; Walter Kyewski, 21 K-Y-E-W-S-K-I; Weston Allen; Don Volk, V-O-L-K; and 22 Michael Wright, W-R-I-G-H-T. 23 Q Can you explain to me the role of Better 24 Built Construction Inc. on this project? 25 A Yes, they were the general contractor for</p>
<p style="text-align: right;">Page 23</p> <p>1 the sixth line item from the bottom in a case called 2 "Seltan versus Miller and Long," S-E-L-T-A-N versus 3 Miller and Long, that's in Montgomery County, 4 Maryland. 5 Q What year is that? 6 A That was last year, 2013. 7 Q Who was the lawyer? 8 A I can't remember his name. 9 Q What kind of case was it? 10 A It was a case where a fireproofing hose 11 that was in use broke free from its attachment to 12 the fireproofing pump, it swung back and struck and 13 injured the plaintiff. 14 Q Was that a products liability suit? 15 A No, it was not. 16 Q What was the theory in that case? 17 A The theory in that case was that the 18 contractor had improperly attached the hose to the 19 machine, number one. Number two, he had 20 improperly -- or did not attach the hose to other 21 portions of the building that allowed it to freely 22 strike the individual. 23 Q Could you supply the plaintiff's 24 attorney's name and phone number to your attorney -- 25 A Sure, yes.</p>	<p style="text-align: right;">Page 25</p> <p>1 the work. 2 Q What was the role of Clark Construction? 3 A Contractually they were a subcontractor to 4 Better Built. 5 Q What was Clark's job on this facility? 6 A The scope of work they were constructing? 7 Q Yeah. 8 A I never got to see the plans and specs so 9 I don't have a real intricate description but it was 10 some type of training facility that the Army needed. 11 It had quite a bit of masonry construction in it and 12 I do know that it had to be explosion-proof which 13 probably meant more -- a little heavier 14 construction. 15 Q I'm sorry, I didn't ask a very good 16 question. What were the job duties for Clark 17 Construction on this project? 18 A The dual role. Again, I mentioned one of 19 those, they were a subcontractor to Better Built. 20 They also were a mentor under this 8A contract, SBA 21 set-aside type of work, where they had a role as the 22 mentor to Better Built who was, I assume, a small 23 business. 24 Q What does the mentor's role entail, what 25 duties?</p>

7 (Pages 22 to 25)

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<p style="text-align: right;">Page 26</p> <p>1 A I don't know, I don't have any experience 2 with it. 3 Q Did you attempt to find out what their 4 duties were? 5 A No. 6 Q What were their duties as a subcontractor? 7 A Well, they had Mr. Schaibly, at least 8 quite a bit of the time, as the site superintendent 9 fulfilling that role. 10 Q What does the site superintendent do? 11 A Site superintendent is generally an 12 orchestrator whose primary job -- of course, he's 13 responsible globally for the site for the 14 progression of the work, scheduling. And probably 15 his biggest role would be that orchestration part, 16 coordination of various subcontractors under the 17 general. 18 Q Who was in charge of safety on this 19 project? 20 A Specifically? 21 Q Yes. 22 A Cory Hanson. In terms of that role. 23 Obviously, everyone, every entity's got some safety 24 responsibilities but the safety rep at the top was 25 from what I understand Mr. Hanson.</p>	<p style="text-align: right;">Page 28</p> <p>1 in this case. I do remember there was a period of 2 time initially in the project where Clark had it and 3 then Better Built brought Mr. Hanson in as the 4 safety rep. 5 Q Have you read the contract between the 6 Corps of Engineers and Better Built? 7 A Yes. 8 Q Did you also read the contract between 9 Better Built and Clark? 10 A Yes. 11 Q The contract in this project between the 12 Corps and Better Built required that there be a 13 separate person in charge of safety for this 14 project, correct? 15 A I believe that's correct, yes. 16 Q When Mr. Schaibly was acting as the 17 superintendent and as the person in charge of safety 18 that was a violation of the contract, correct? 19 A I don't know if it was a violation of the 20 contract. I don't know how to answer that. 21 "Violation of the contract" is a 22 legal term. I don't know, I don't know if they had 23 been in violation of the contract or not. 24 Q If the contract says the same person can't 25 be the superintendent and the safety person that's a</p>
<p style="text-align: right;">Page 27</p> <p>1 Q Did Clark Construction have a safety 2 obligation? 3 A Again, I mentioned that as I look at the 4 joint venture -- they were part of a joint 5 venture -- the joint venture in total had an 6 overarching safety responsibility, yes. 7 Q As part of the joint venture was Clark 8 Construction obligated to enforce safety? 9 A Well, Clark Construction was part of the 10 joint venture. The joint venture had an obligation 11 to enforce safety, yes, and Clark was part of the 12 joint venture. 13 Q For a period of time would you agree that 14 Clark was the only one on the project to enforce 15 safety? 16 A As I recall, there was a period of time 17 initially before Mr. Hanson came on board where 18 Clark had the -- they had it all, so to speak. I do 19 recall that from the testimony. 20 Q When the project first started Jim 21 Schaibly operated as the superintendent and as the 22 person in charge of safety, correct? 23 A I don't recall that, I don't know. 24 Q It's in his deposition. 25 A It probably is but there's a lot of depos</p>	<p style="text-align: right;">Page 29</p> <p>1 violation or a breach of the contract, correct? 2 A I'd have to ask the owner. Evidently, I 3 haven't seen any evidence that the owner, that being 4 the Army, was too concerned about it. I haven't 5 seen any cure letters or notices of violation coming 6 from up high. I'm not sure what that has to with 7 Mr. Dancer's accident anyway. But I'm not ready to 8 say: I tell you, it's a violation of the contract. 9 There was someone in the job fulfilling the role. 10 Q If the contract says that you can't have 11 the same person be the safety person and have 12 another job on the project then that's not in 13 accordance with the contract, agreed? 14 MR. DAVIDSON: Objection; the contract 15 speaks for itself. 16 MR. CUDNEY: I'll join. 17 MR. DAVIDSON: You're just asking him to 18 interpret the contract and the contract is what 19 it is. 20 MR. BENNER: He's your safety guy. 21 MR. DAVIDSON: I don't care. You're 22 asking him: What does the contract say? The 23 answer is: The contract says what it says. 24 MR. BENNER: Well, fine. That's great. 25 I'd like to take an answer.</p>

8 (Pages 26 to 29)

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<p style="text-align: right;">Page 30</p> <p>1 THE WITNESS: Can you ask it again, 2 please? 3 MR. BENNER: Can you read it to him. 4 (The requested portion was read 5 back by the court reporter.) 6 THE WITNESS: I would go so far to say it 7 wasn't in accordance with the written word in 8 the contract, yes. 9 BY MR. BENNER: 10 Q Who was the second person that came on the 11 project for safety? 12 A After Mr. Hanson? 13 Q No, the second person who came onto the 14 project who was in charge of safety on this job? 15 A I did review his deposition, I would have 16 to -- 17 Q I'll tell you what, let me help you out. 18 If I told you the second person who was on this 19 project for safety was Robert Dowding would you 20 agree with that? 21 A I might if I can verify that. 22 Q Just for the record, can you tell us what 23 you're reviewing? 24 A I'm looking at Mr. Dan Myola (ph) and Mr. 25 Dowding. You're calling him the second safety rep.</p>	<p style="text-align: right;">Page 32</p> <p>1 U.S. Corps of Engineers Safety and Health 2 Requirements Manual also known as EM 385 dash 1 dash 3 I were complied with? 4 MR. DAVIDSON: Objection; compound. 5 THE WITNESS: As I recall, having read the 6 contract, it states that or approximately that 7 wording, yes. 8 BY MR. BENNER: 9 Q Did you agree that the contract gave 10 Better Built and Clark supervisory and coordinating 11 authority over the subcontractors on this project? 12 A Are these direct regurgitation of the 13 contract? If that's exactly what's in the contract 14 I would say I do agree that that's what the contract 15 says. It sounds familiar, having looked at the 16 contracts. 17 Q So you would agree the contract gave 18 Better Built and Clark supervisory and coordinating 19 authority over the subcontractors on the project, 20 correct? 21 MR. DAVIDSON: Again, object; you're 22 asking him to interpret the contract which says 23 what it says. Go ahead and answer. 24 THE WITNESS: I can go back to the 25 contract and -- but having done a lot of</p>
<p style="text-align: right;">Page 31</p> <p>1 Before I give you an answer I want to make sure I'm 2 accurate in that answer. 3 Q Okay, all right. 4 A I know Mr. Dowding said he showed up on 5 site April or May of 2010, was responsible for 6 safety, signed there by Clark Construction. So at 7 some point, some period of time he was there in a 8 safety role. I would agree with that. 9 Q Did you make any evaluation whether he met 10 the qualifications for the site safety person under 11 E 385? 12 A No. 13 Q Would it be fair to say that you don't 14 independently know whether he was qualified to be 15 the site safety health person on this project 16 pursuant to E 385, correct? 17 A That's correct. 18 Q The third person that came onto the site 19 to be the site safety and health person was Cory 20 Hanson, correct? 21 A Correct. 22 Q Did the Army Corps of Engineers contract 23 require Better Built Construction, Inc. and Clark 24 Construction Company, Inc. to ensure the work site 25 safety provisions of OSHA, MIOSHA, ANSI, and the</p>	<p style="text-align: right;">Page 33</p> <p>1 federal contracts it sounds like it would be a 2 clause that is appropriate for the contract and 3 would be there, yes. 4 BY MR. BENNER: 5 Q Who is in charge of safety at the Fort 6 Custer project? E 385 section 01.8A.17 specifically 7 required defendant to employ and assign to the Fort 8 Custer project a qualified full-time site and safety 9 health officer to be responsible for managing and 10 enforcing and implementing project safety and health 11 program, ensuring compliance with E 385 dash one 12 dash one. Who was in charge of that? 13 A Mr. Hanson. 14 Q Prior to Mr. Hanson was Mr. Schaibly and 15 Mr. Dowding, correct? 16 A Correct. 17 Q Was Cory Hanson qualified to act as the 18 site safety and health officer for the Fort Custer 19 project? I'll redo the question. 20 Was Cory Hanson qualified to act as 21 the site safety and health officer for the Fort 22 Custer project? 23 A I think by the literal requirements in the 24 contract he had his OSHA 30. I don't believe he had 25 the requisite experience time, as I recall, that was</p>

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<p style="text-align: right;">Page 34</p> <p>1 required by the Army.  2 Q So he wouldn't be qualified, correct?  3 A He didn't have all the qualifications that  4 are required by the Army, that's based on my  5 recollection of the testimony and review of the  6 documents, yes.  7 Q Because he didn't have the past experience  8 he wouldn't be qualified to be the site safety and  9 health person under E 385, correct?  10 A It doesn't mean he necessarily couldn't  11 fulfill the role and do the job, it just meant on  12 paper he didn't have every box checked in terms of  13 what was required of Mr. Hanson.  14 But my other reply on that is that  15 the Army controlled this work and they determine  16 what is acceptable to them. And having been in that  17 role I know that I will guarantee that Mr. Hanson's  18 name didn't stop at Better Built and Clark, that the  19 Army knew who they were getting as their safety rep.  20 And he was allowed to fulfill that role and  21 therefore, in my mind, it was an approval by the  22 Army and other powers that be in the project.  23 Q How would they know, how would the Army  24 know, how would the Army Corps of Engineers know  25 what his qualifications were?</p>	<p style="text-align: right;">Page 36</p> <p>1 Q So the only information that the Army  2 Corps of Engineers would have relative to the  3 qualification of Cory Hanson is the information  4 given to them by Better Built and Clark, correct?  5 MR. DAVIDSON: Object to foundation.  6 THE WITNESS: I don't know.  7 BY MR. BENNER:  8 Q Where else would the Army Corps of  9 Engineers get any additional information relative to  10 Cory Hanson's qualifications?  11 A I don't know but you're asking me for an  12 absolute, is that the only source they have. I  13 don't know.  14 Q How about this: As far as you know,  15 sitting here as the safety expert for Clark, is that  16 the information that the Army Corps of Engineers got  17 was from Better Built and Clark relative to the  18 qualifications of Cory Hanson, correct?  19 A Can you repeat that, please?  20 (The requested portion was read  21 back by the court reporter.)  22 THE WITNESS: I don't know how to answer  23 that. I really -- I think I know what you want  24 but your question doesn't convey to me, it  25 doesn't equate to what is in my mind that I</p>
<p style="text-align: right;">Page 35</p> <p>1 A They don't do this with a blindfold on.  2 They know, they require their contractors to provide  3 that information to them, it would be very  4 surprising to me if they didn't.  5 Q So sir, what you're telling me is the Army  6 Corps of Engineers is relying on information  7 furnished to them by Better Built and Clark relative  8 to the qualifications of Cory Hanson, correct?  9 MR. CUDNEY: Foundation.  10 THE WITNESS: I don't even know what you  11 just said. Can you repeat that?  12 BY MR. BENNER:  13 Q Sir, what you're telling me is the Army  14 Corps of Engineers is relying on the information  15 relative to Cory Hanson's qualification from the  16 information provided to them by Better Built and  17 Clark, correct?  18 MR. CUDNEY: I'm going to object to  19 foundation.  20 MR. DAVIDSON: Object to the form.  21 THE WITNESS: I would presume it obviously  22 would come from Better Built and Clark,  23 whatever they were providing to the Army  24 contracting officer, yes.  25 BY MR. BENNER:</p>	<p style="text-align: right;">Page 37</p> <p>1 think you're wanting to get said or asked or  2 respond to your question. Is there another way  3 to state it or ask it?  4 BY MR. BENNER:  5 Q I'll try. As far as you know, sitting  6 here with the information that you have presently,  7 the only information that the Corps of Engineers got  8 relative to Cory Hanson's qualifications came from  9 either Better Built or Clark, correct?  10 A Probably so, yes.  11 Q The reason I keep asking you questions is  12 I don't want you to show up at the trial and say:  13 Oh, boy, you didn't ask me about some other area of  14 information that the Corps would have had about Cory  15 Hanson's expertise to be the site safety and health  16 person. I'm just trying to make sure we're on the  17 same page.  18 A I understand.  19 MR. CUDNEY: Object to form and  20 foundation.  21 BY MR. BENNER:  22 Q If Cory Hanson did not take the test for  23 the OSHA 30 is he qualified to have passed OSHA 30?  24 Go ahead.  25 A No, please, I'd love for you to ask that</p>

10 (Pages 34 to 37)

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<p style="text-align: right;">Page 38</p> <p>1 again.</p> <p>2 Q Don't you have to take a test to pass</p> <p>3 OSHA 30?</p> <p>4 A Today and as we sit here on May 20th, 2014</p> <p>5 you do have to take an examination to get your</p> <p>6 OSHA 30, yes.</p> <p>7 Q Was there a different rule in 2010 that</p> <p>8 you didn't have to take a test to pass OSHA 30?</p> <p>9 A I don't know. I don't believe so but I</p> <p>10 can't say definitively as I sit here that that</p> <p>11 requirement didn't exist then. I don't know for</p> <p>12 certain. I believe it did but I don't know for</p> <p>13 certain.</p> <p>14 Q If Better Built and/or Clark represented</p> <p>15 to the Corps of Engineers that Cory Hanson had</p> <p>16 passed the OSHA 30 that would be an incorrect</p> <p>17 statement since he didn't take that test?</p> <p>18 MR. CUDNEY: Object to the form and</p> <p>19 foundation.</p> <p>20 THE WITNESS: I think formally my opinion</p> <p>21 would be that he had not fulfilled it.</p> <p>22 Evidently someone else thought he had completed</p> <p>23 enough of the information and the syllabus, if</p> <p>24 you will, to qualify as an OSHA 30.</p> <p>25 BY MR. BENNER:</p>	<p style="text-align: right;">Page 40</p> <p>1 Q So what would be the basis for this person</p> <p>2 knowing that Cory had actually even looked at the</p> <p>3 OSHA 30, based on the testimony Cory Hanson gave</p> <p>4 you?</p> <p>5 A It would have come from Better Built.</p> <p>6 Q When you say "it would have come from</p> <p>7 Better Built" what do you mean by that?</p> <p>8 A The fact that he had his OSHA 30. I think</p> <p>9 that's what you asked me. You said: Where would</p> <p>10 that have come from, I believe.</p> <p>11 Q My real question was: Where would the</p> <p>12 information have come from that Cory had ever looked</p> <p>13 at the OSHA 30; nobody knows that, correct, since no</p> <p>14 test was given?</p> <p>15 A Correct.</p> <p>16 Q Do you know what Cory Hanson's job was</p> <p>17 prior to becoming the site safety person on this</p> <p>18 job?</p> <p>19 A I know it's in the testimony, I would have</p> <p>20 to look back at my outline.</p> <p>21 Q Okay. Cory Hanson's last job for Better</p> <p>22 Built was as the estimator, correct?</p> <p>23 A That sounds familiar, yes.</p> <p>24 Q And if Better Built or Clark represented</p> <p>25 to the Army Corps of Engineers that he had been the</p>
<p style="text-align: right;">Page 39</p> <p>1 Q Did you read Cory Hanson's deposition?</p> <p>2 A I did.</p> <p>3 Q Cory Hanson says in his deposition that</p> <p>4 the Better Built safety person gave him a PowerPoint</p> <p>5 presentation and sent him up to an apartment in</p> <p>6 Kalamazoo and told him to review it, correct?</p> <p>7 A Correct.</p> <p>8 Q Then Cory Hanson called back and said:</p> <p>9 I've reviewed it. And the guy said: You passed,</p> <p>10 correct?</p> <p>11 A That sounds similar to what I read, yes.</p> <p>12 Q The person who is passing him has no idea</p> <p>13 if he ever even looked at the PowerPoint</p> <p>14 presentation for the OSHA 30, correct?</p> <p>15 MR. DAVIDSON: Object to form and</p> <p>16 foundation.</p> <p>17 THE WITNESS: Probably correct.</p> <p>18 BY MR. BENNER:</p> <p>19 Q Not probably correct, it's entirely</p> <p>20 correct because he never gave the guy his test,</p> <p>21 correct?</p> <p>22 MR. CUDNEY: Object; argumentative.</p> <p>23 THE WITNESS: Based on the testimony he</p> <p>24 did not provide a test, correct.</p> <p>25 BY MR. BENNER:</p>	<p style="text-align: right;">Page 41</p> <p>1 site safety person on the previous project, that</p> <p>2 would be inaccurate, correct?</p> <p>3 A If he had been in an estimator role and</p> <p>4 they had informed the Army that he had been in a</p> <p>5 safety role that would be incorrect, yes.</p> <p>6 Q That would be a violation of Better Built</p> <p>7 and Clark's obligations under E 385 to correctly</p> <p>8 inform the Corps of Engineers relative to Cory's</p> <p>9 qualifications to be the site safety and health</p> <p>10 person, correct?</p> <p>11 A I'm not sure you can lump sum Clark into</p> <p>12 the middle of that if there was some kind of</p> <p>13 inaccuracy in Cory Hanson's training. I'm not sure</p> <p>14 it necessarily would have passed through Clark or</p> <p>15 somehow been made known to Clark.</p> <p>16 Q Did you see Karen Halsey's deposition</p> <p>17 testimony where she said that Clark chose Cory</p> <p>18 Hanson to be the site safety and health person on</p> <p>19 this job?</p> <p>20 A I reviewed one of her depositions. I</p> <p>21 think it was Volume Three. I don't believe that</p> <p>22 I -- I don't think that was in -- Volume Three had a</p> <p>23 lot to do with ownership and administrative issues.</p> <p>24 I don't recall if she said that in that deposition</p> <p>25 or not. I don't think it was in that volume.</p>

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<p style="text-align: right;">Page 42</p> <p>1 Q You haven't reviewed depositions one and 2 two of Karen Halsey's, correct? 3 A I want to make sure it was Three that I've 4 seen, I believe it is Three. It's not on my outline 5 but I'm reasonably sure it's Volume Three. 6 Q Have you seen the information that either 7 Clark and/or Better Built supplied to the Corps of 8 Engineers relative to Cory Hanson's qualifications 9 to be the site safety and health person? 10 A I don't believe so, no. 11 Q Have you asked your lawyer for that? 12 A No. 13 Q Would you like to see that document? 14 A Yes, I'd like to see it. There's a 15 possibility I did see it but as my memory, I don't 16 think I have. I don't want to say definitively. If 17 I haven't seen it yes, I'd like to see it. 18 Q Why would you like to see it, so that you 19 could judge what Cory Hanson's qualifications were 20 in the representations made to the Corps of 21 Engineers relative to his qualifications; would that 22 be correct? 23 A It would help me do that. 24 Q And Better Built and/or Clark or both had 25 an obligation to provide a qualified site safety and</p>	<p style="text-align: right;">Page 44</p> <p>1 the document says what it says. It speaks for 2 itself. 3 MR. BENNER: I'll tell you what, to 4 address your concern, I'll even help you. It's 5 01.8.17. 6 MR. DAVIDSON: Same objection. 7 THE WITNESS: Okay, I'm there. 8 BY MR. BENNER: 9 Q Is that the site safety health provision? 10 A It is 01 dot A dot 17, Site Safety and 11 Health Officer, SSHO. Do you want me to read that? 12 Q Just to yourself so we can ask some 13 questions. 14 A Okay. 15 Q You've had a chance to review the 16 qualifications for the site safety and health person 17 under EM 385 dash one dash one, correct? 18 A Correct. 19 Q On that basis would you agree that Cory 20 Hanson is not qualified pursuant to that section to 21 be the site safety and health person on this job? 22 A He does not meet all the requirements of 23 the EM 385, that's correct. 24 Q Okay, thank you. Would you agree that 25 it's the responsibility of the general contractor on</p>
<p style="text-align: right;">Page 43</p> <p>1 health person for this project, correct? 2 A I think primarily the prime, the GC being 3 Better Built, would have a primary role there but 4 the general venture created collectively would have 5 an obligation to provide a proper safety rep, yes. 6 Q If Karen Halsey says it was Clark who 7 chose Cory Hanson to be the site safety and health 8 person then that would be a direct responsibility 9 for them, correct? 10 A If they were involved in that, yes. 11 Q If Clark and Better Built did not provide 12 a qualified site safety and health person in this 13 matter, that being Cory Hanson, that would be a 14 violation of their obligations under EM 385 dash one 15 dash one, correct? 16 A I would have to read the EM 385. 17 Q I brought a copy. Would you like to take 18 a look at it? 19 A Sure. What am I looking for? 20 Q The qualifications for the site safety and 21 health person and if Cory Hanson qualified to be 22 that. 23 MR. DAVIDSON: Let me object to the form 24 of the question; you're asking him to locate 25 something in a document and interpret it when</p>	<p style="text-align: right;">Page 45</p> <p>1 a construction project like the Fort Custer project 2 in 2010 to take reasonable steps within its 3 supervisory and coordinating authority to guard 4 against readily observable and avoidable dangers 5 that created a high degree of risk to a significant 6 number of workers? 7 A That's a lot of question. 8 MR. CUDNEY: Objection; compound. 9 BY MR. BENNER: 10 Q I'll break it down. 11 A Thank you. 12 Q Would you agree that it's the 13 responsibility of the general contractor, that being 14 Better Built and Clark, on the construction project, 15 that being Fort Custer in 2010, to take reasonable 16 steps within its supervisory and coordinating 17 authority to guard against readily observable and 18 avoidable dangers? 19 A Yes. 20 Q That would also apply when that was a high 21 degree of risk to a significant number of workers, 22 correct, their job to enforce safety? 23 A Their job was to enforce safety in general 24 so it would fit within that, sure. 25 Q Would you agree that under EM 385 that the</p>

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<p style="text-align: right;">Page 46</p> <p>1 Hydromobile scaffolding was supposed to be 2 constructed in accordance with the owners manual? 3 A Yes. 4 Q Would you agree that the Hydromobile was 5 not constructed in accordance with the owners 6 manual? 7 A I wouldn't necessarily agree with that, 8 no. Can you be more specific in terms of which 9 features of the? 10 Q Well, the EM 385 requires that the -- 11 strike that. 12 The Hydromobile requires that the 13 only bridging that is allowed to be used is that 14 manufactured by Hydromobile; do you agree? 15 A I don't think that's what it says, I don't 16 believe, no. 17 Q What do you think it says? 18 A As I recall, in the 385 and/or the users 19 manual for the Hydromobile it says it can't be a 20 replacement of factory parts. 21 Q It says that -- well, the Hydromobile 22 manual requires that their bridging system be used. 23 A I never saw that. I did look for that, I 24 didn't see that in the Hydromobile manual. I can't 25 agree with you unless I see that, that there was an</p>	<p style="text-align: right;">Page 48</p> <p>1 Q And companies. 2 A Yes. 3 Q One of the purposes of EM 385 dash one 4 dash one is for the protection of all workers on the 5 project? 6 A Yes. 7 Q Did Cory Hanson have an obligation to 8 review the manual for the Hydromobile? 9 A I don't believe there was any definitive 10 obligation for him to review the manual, no. 11 Q What do you base that on? 12 A I base it on the fact that the masonry 13 contractor who owned that piece of equipment, which 14 is fairly specialized, had an obligation to 15 obviously know thoroughly the manual but also that 16 the general contractor and the Army required that 17 the AHA, the Activity Hazard Analysis, had been done 18 for operations like that. 19 And therefore they had satisfied in 20 their minds that when the masonry subcontractor went 21 out to undertake any actions relative to the 22 scaffold that they would be doing that in accordance 23 with that AHA, with the 385, with MIOSHA, with ANSI 24 A10.9 or whatever other standards might pertain. 25 Q Would you agree that Cory Hanson did not</p>
<p style="text-align: right;">Page 47</p> <p>1 absolute requirement that the proprietary 2 factory-manufactured bridge was the only thing they 3 could have put between any two adjacent decks. 4 Q Did you read Mike Wright's deposition? 5 A Yes. 6 Q Mike Wright cites the provisions that they 7 violated the Hydro manual by not using the bridging 8 system? 9 A I disagree with him based on what's in the 10 Hydro manual, my interpretation of that. Mr. Wright 11 said a lot things I disagree with, and that's one of 12 them. 13 Q You reviewed the Hydromobile manual? 14 A I did. I didn't read every word of it but 15 I read sections that I thought were pertinent to the 16 case. 17 MR. BENNER: Can we take break for a 18 second. 19 (Brief recess.) 20 BY MR. BENNER: 21 Q Do you agree that E 385 applies to all 22 companies and individuals working on the project at 23 Fort Custer that's the subject matter of this 24 lawsuit? 25 A All persons working on the project?</p>	<p style="text-align: right;">Page 49</p> <p>1 have a users manual to review for the Hydromobile 2 scaffolding? 3 A I don't recall if he had that in his 4 possession or not, I don't recall. 5 Q Did you see the July 22nd memo that he 6 made to one of his foremen saying he was still 7 requesting the Hydromobile users manual? 8 A I do recall that, yes. 9 Q On July 22nd we know he did not have the 10 Hydromobile manual to review, correct? 11 A Yeah, correct, I would agree with that. 12 Q Are you saying that the general contractor 13 site safety person has no obligation to make sure 14 that the scaffolding is being constructed in 15 accordance with the owners manual? 16 A I don't think that the general contractor 17 would have an obligation to ensure that every 18 intricate detail of a scaffold system like that is 19 known. That's why they hire experts like Leidal and 20 Hart and that's why they have subcontractors like 21 Leidal and Hart fill out and then have approve their 22 AHA so I'm sure they're going to do it properly. 23 They rely on them to do that to a large extent. 24 Q I'm not asking, sir, I'm asking about the 25 planking system or the bridge system that should be</p>

13 (Pages 46 to 49)

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<p style="text-align: right;">Page 50</p> <p>1 used on the Hydromobile. That's readily visible, 2 isn't it, to the site safety and health person? 3 A It would be. 4 Q Wouldn't you agree that the site safety 5 and health person should make sure that the planking 6 that the workers are standing on -- strike that. 7 If the planking for the Hydromobile 8 unit is inadequate that creates a hazard for all 9 workers standing on it, correct? 10 A If it's inadequate obviously, it would 11 create a walking or working surface that was not 12 compliant, yes. 13 Q An inadequate planking system would be 14 something that would be readily observable to the 15 site safety and health person, correct? 16 MR. CUDNEY: Object to foundation. 17 THE WITNESS: If there were obvious 18 discrepancies in it you could simply look up 19 and see that, yes, sure. 20 BY MR. BENNER: 21 Q If the planking system for the workers 22 using the scaffolding was inadequate it would be 23 unsafe from 6 feet to 40 feet, correct, doesn't 24 matter what the distance is? 25 A Can you repeat that question?</p>	<p style="text-align: right;">Page 52</p> <p>1 THE WITNESS: Well, OSHA says it's not -- 2 it's 6 feet it's not for a scaffolding, MIOSHA. 3 Could injury still happen at 6 feet, yes, I 4 believe it's possible. 5 BY MR. BENNER: 6 Q What distance do you think it becomes an 7 unsafe situation for workers working on inadequate 8 planking on a scaffold, what height? 9 A You're asking a question about something 10 that's got two facets to it. It's got the whether 11 it's safe or not, and the other side of that is 12 what's the requirement to do that. 13 You keep asking me about what's safe 14 and I'd rather stay away from that because I'm not, 15 again, I'm not here to be an expert at what heights 16 will hurt the human body. I think I know as a 17 person of common sense in my own experience but that 18 question is something I'd rather stay away from. In 19 other words, I'd rather stay with what's required 20 of -- by the regulations for protection of a worker 21 if you understand what I -- 22 Q I understand, absolutely I understand. 23 What height does it become unsafe for workers on a 24 scaffold if they're working on inadequate planking? 25 MR. DAVIDSON: Object to form and</p>
<p style="text-align: right;">Page 51</p> <p>1 Q Sure. What I'm asking: Do you agree that 2 you have to tie off above 6 feet? 3 A No, I don't agree with that. 4 Q At what height do believe you have to tie 5 off? 6 A It depends on what situation. OSHA and 7 MIOSHA have many exceptions to the basic fall 8 protection rule. You asked me a very simple blanket 9 question about fall protection and I don't agree 10 that you always have to be tied off above 6 feet. 11 Q Would you agree that if you fall from a 12 distance of 6 feet that can cause significant 13 injury? 14 A I'm not a biomechanical engineer. Could a 15 fall from 6 feet injure you, yes. 16 Q A fall from 6 feet can cause a significant 17 injury, correct? 18 A It's possible, yes. In my experience, 19 yes. 20 Q What I'm asking you is if the planking on 21 the scaffolding is inadequate starting at 6 feet and 22 up, that's a danger for all workers; it doesn't 23 matter whether it's at 6 feet or 40 feet, correct? 24 MR. DAVIDSON: Object to the form of the 25 question.</p>	<p style="text-align: right;">Page 53</p> <p>1 foundation; asked and answered. 2 BY MR. BENNER: 3 Q I'll rephrase it. At what height does it 4 become dangerous for workers on a scaffold if 5 they're working on an unsafe planking system? 6 A I think a person could be injured from a 7 height of 2 feet if you get down to it. If you're 8 asking me at what height could someone be injured, 9 is that the question? 10 Q Yes. 11 A People stub their toes on sidewalks and 12 fall really, no difference in elevation and become 13 injured so I think an injury is possible at any 14 height, in my own experience. 15 Q What I'm trying to get to, sir, is: It 16 doesn't matter whether you're at 6 feet on unsafe 17 planking or at 40 feet on unsafe planking, you can 18 be injured and suffer significant injury, correct? 19 A Whether it's significant or not I don't 20 know. I believe an injury could occur at any 21 height. That's not an expert answer I gave you in 22 terms of the effects of falls on the human body. I 23 want to stay away from even any kind of indication 24 that that might be the case. 25 Q Is insufficient or excessive overhang of</p>

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<p style="text-align: right;">Page 54</p> <p>1 planks at their support a common scaffolding 2 problem? 3 A In my own experience on scaffolds it's not 4 a problem, no, a common problem. 5 MR. CUDNEY: Can you read me the question, 6 please? 7 THE WITNESS: It's not if it's constructed 8 properly. In my own experience I haven't spent 9 a lot of time on scaffolds, primarily I 10 supported scaffolds. It was never a problem 11 that continued to present itself, no. 12 BY MR. BENNER: 13 Q Is insufficient or excessive overhang 14 planks on scaffold a problem? 15 A It's an excessive overhang? Is that the 16 question? Is excessive overhang a problem? 17 Q Insufficient or excessive. 18 A It doesn't meet the regulations and it 19 doesn't meet the regulations for a reason so yes, I 20 would say that it's a problem, it presents a 21 potential hazard, yes. 22 Q Would you agree it creates a hazard when 23 you have insufficient or excessive overhang of 24 planks because it could cause a plank to tip up 25 while insufficient overhang causes a plank to slip</p>	<p style="text-align: right;">Page 56</p> <p>1 But to go out and look -- for 2 instance, on this day, to go out and take a look I 3 think it would be -- it would only be by chance 4 mainly that possibly a safety rep might go out and 5 see this. This happened so quickly and was such a 6 discreet event that I think the likelihood of anyone 7 other than Mr. Dancer realizing what had happened, 8 even his own employees or supervisors, I think is 9 very small. 10 Q Let's get back to my question. My 11 question is: If the planking on the scaffolding is 12 either excessive or insufficient and it lasted for a 13 number of days would that be something that the 14 general contractor should see? 15 A If it's a condition that lasted for days I 16 think you have a completely different case than what 17 we have here, from what I understand we have here 18 based on the documents. That's not what happened 19 with Mr. Dancer. 20 Q Thank you, but that's not my question. 21 A I think I answered it, I'm pretty sure. 22 Q I don't think you did. 23 A The first part of my answer I believe was 24 your answer. 25 Q Right.</p>
<p style="text-align: right;">Page 55</p> <p>1 off: would that be agreeable? 2 A It's certainly possible, yes. 3 Q Can these conditions be easily identified? 4 A They could be identified visually, yes. 5 Q Would you agree that the site safety and 6 health person could readily identify planking on the 7 scaffold which is either excessive or insufficient? 8 A It's possible you could see it from 30 or 9 to 35 feet below the work platform or the primary 10 platform, yes. 11 Q Is that as part of the site safety and 12 health person's job duties something he should be 13 inspecting for? 14 A I don't think on a regular basis, no. 15 Q What's a regular basis? 16 A To me a regular basis would be frequently. 17 Q Once a day, twice a day? 18 A I don't think a safety representative 19 really would, it's not something that would be 20 typically be on the radar screen of the safety rep 21 for a GC. A GC safety rep is looking very global, 22 particularly where you got more than one 23 subcontractor working and over their coordination 24 and overlap and how one could possibly injure 25 another.</p>	<p style="text-align: right;">Page 57</p> <p>1 A Could she read it back possibly, is that 2 okay? 3 Q No, I understand what your answer was, 4 sir. I'm really paying attention. My question 5 is -- if you can just find yourself answering the 6 question I would really appreciate it. If the 7 condition of excessive overhang of planking or 8 insufficient planks on the scaffolding lasts for 9 several days or even longer that's something that 10 the general contractor's site safety and health 11 person should recognize, correct? 12 MR. DAVIDSON: Objection; asked and 13 answered. 14 THE WITNESS: I think the likelihood of it 15 being recognized definitely increases 16 significantly if it's a condition that persists 17 and lasts for a longer period of time, yes, 18 it's possible. 19 BY MR. BENNER: 20 Q And if the site safety and health person 21 sees that condition he should take steps to rectify 22 it and make the scaffolding safe, correct? 23 A Absolutely, yes. 24 Q Is there a difference between scaffolding 25 and a Hydromobile unit?</p>

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<p style="text-align: right;">Page 58</p> <p>1 A Well, a Hydromobile is a subset of the 2 scaffolding definition. 3 Q Did you see page 62 of the owners manual 4 for the Hydromobile which provided that all the 5 planks should be clamped? 6 A I did see that page, yes. 7 Q Did you agree that that's what it 8 required? 9 A Would you happen to have a copy of it? 10 Q It's on the way. 11 MR. DAVIDSON: Wait until you see it to 12 answer unless you remember what it says. 13 THE WITNESS: I remember, I do remember 14 the page and the little diagram to the left 15 talked about any type of clamping or 16 attachments of the planks. I had a problem 17 with the definitive thought that this is 18 absolute and that's why I would like to see it 19 when the copy comes, if we could, sir, that 20 would be -- I'd like to base my answer on that. 21 BY MR. BENNER: 22 Q I would like to show it to you. 23 A Thank you. 24 Q Do you believe that the Hydromobile 25 scaffolding that was used out on this job site,</p>	<p style="text-align: right;">Page 60</p> <p>1 THE WITNESS: It was, based on my review 2 of the contract. It was a requirement of the 3 contract, yes. 4 BY MR. BENNER: 5 Q Do you know what other trades were working 6 on the Hydromobile scaffolding out on the Fort 7 Custer job? 8 A At what time? 9 Q Any time. 10 A I believe I do. 11 Q Can you tell me who they are? 12 A I believe that possibly the electrician 13 sub and the plumbing sub had utilized, had gained 14 access at some point in time. 15 Q Would you agree that the electrical 16 contractor was up there on multiple occasions? 17 A I knew they had been up there, yes. 18 Q You got that from Eric Koshurin's 19 deposition, correct? 20 A I believe Koshurin who is the electrician, 21 yes. 22 Q Cory Hanson says that in his deposition 23 also, correct, that the electricians were up there? 24 A I believe so. 25 Q And the plumbing contractor says he was up</p>
<p style="text-align: right;">Page 59</p> <p>1 specifically on the area from which Ronnie Dancer 2 fell was -- strike that. 3 How many units do you think of 4 Hydromobile scaffolding were on the wall that Ronnie 5 Dancer fell from? 6 A I believe there were three. 7 Q Did you look at the pictures? 8 A I have, yes. 9 Q Could you tell whether or not they were 10 all Hydromobile units or whether they were 11 different? 12 A They were definitely different appearances 13 of some of the masts on these. Whether they were 14 Hydromobiles of possibly a different era or a 15 different version of a model, I can't say. I did 16 notice some differences, if that answers your 17 question. 18 Q Do you agree that complying with and 19 enforcing the terms of EM 385 dash one dash one at 20 the Fort Custer site was within the supervising and 21 coordinating authority of Better Built Construction 22 and Clark Construction and that was, in fact, 23 required under the terms of the contract with the 24 Army Corps of Engineers? 25 MR. CUDNEY: Object to form; compound.</p>	<p style="text-align: right;">Page 61</p> <p>1 on the Hydromobile scaffolding multiple times also, 2 correct? 3 A I believe -- I know the plumber had used 4 the scaffold, yes. 5 Q Multiple times, correct? 6 A I don't know that. 7 Q Did you read his deposition? 8 A I did. 9 Q You want to refer to it? Says he's up on 10 the scaffolding 13 to 15 times. 11 A That was Mr. Koshurin or was it the 12 plumber you referred to? 13 Q Plumber. 14 A Are you talking about Mr. Allen? 15 Q Yes, sir, Wes Allen. 16 A Yes. 17 Q Mr. Wes Allen says he's up on the 18 scaffolding between 13 and 15 times; is that 19 correct? 20 A No. 21 Q What's he say? 22 A Based on my outline he said 12 to 16 23 times. 24 Q Okay. Big difference. 25 A Well.</p>

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<p style="text-align: right;">Page 62</p> <p>1 Q There's also documentation from Cory 2 Hanson that the cement contractors were also on the 3 scaffolding, correct? 4 A I would have to verify. Are you -- 5 Q I just want to help you. So, are you 6 looking at Cory Hanson's dep or are you looking at 7 your notes? 8 A My notes. 9 Q Okay, I'm sorry. 10 MR. DAVIDSON: He's looking at his notes 11 of the deposition. If it's not in the 12 deposition you can tell him that. 13 MR. BENNER: It's not in his deposition. 14 MR. DAVIDSON: Tom, he wasn't asked about 15 it. 16 THE WITNESS: I can't find any reference 17 to it. My outline is 12 pages long and if it 18 was there. 19 BY MR. BENNER: 20 Q Did you see the recent documents that were 21 produced by Better Built and Clark relative to Cory 22 Hanson's safety notes where he indicates that's 23 there concrete people up on the scaffolding who are 24 not tied off? 25 A I don't believe so. It's possible, I</p>	<p style="text-align: right;">Page 64</p> <p>1 an area where you have multiple trades at any 2 one time undertaking, performing their work. 3 BY MR. BENNER: 4 Q Would you agree that laborers and masons 5 are separate trades? 6 MR. DAVIDSON: Object to form and 7 foundation. 8 THE WITNESS: There are separate trade 9 categories. The labor trade, if you will, 10 actually exists as a subset of just about every 11 major category of trades: Mechanical, 12 plumbers, electricians. 13 In this case we had a laborer, Mr. Dancer, 14 who was mason tender laborer so his roles and 15 duties were more specific to the masonry trade 16 but, if that answers your question. 17 I don't look at a mason and a laborer -- a 18 mason and general laborer I would say would be 19 separate, possibly separate roles. 20 BY MR. BENNER: 21 Q Would you agree that laborers and masons 22 have their own unions? 23 A Yes. 24 Q Would a common work area include one trade 25 working on the scaffolding on day one and then a</p>
<p style="text-align: right;">Page 63</p> <p>1 don't remember seeing that. 2 Q When the electricians were up on the 3 scaffolding does that create a common work area? 4 A If you had multiple subcontractors on this 5 device you would have a common work area, yes. 6 Q Do the subcontractors all have to be on 7 the scaffolding at one time or just in the future or 8 previous? 9 A I don't understand. 10 Q In order to have a common work area if 11 you're going to have a contractor up there on day 12 one and then another contractor up on day ten does 13 that make a common work area -- 14 MR. CUDNEY: Object to foundation. 15 BY MR. BENNER: 16 Q -- and if they're there, separate? 17 MR. CUDNEY: Calls for a legal conclusion. 18 MR. DAVIDSON: I'll join and object to 19 form and foundation. 20 BY MR. BENNER: 21 Q Let me back up. What's your definition of 22 a common work area? 23 MR. DAVIDSON: Object; form and 24 foundation. 25 THE WITNESS: A common work area would be</p>	<p style="text-align: right;">Page 65</p> <p>1 separate trade working on the scaffolding on day 2 five and not be there jointly? 3 MR. DAVIDSON: Object to form and 4 foundation. 5 MR. CUDNEY: I'll join. 6 THE WITNESS: In my own opinion, my own 7 understanding of a common work area is when 8 there's a simultaneous operation by two or more 9 trades. In other words, if your question is: 10 On Monday if Smith Plumbing is working on 11 wall A and then on Thursday electricians 12 working on that same spot on wall A, is that a 13 common work area based on two independent 14 operations days apart? In my opinion, no, it 15 would not be. 16 BY MR. BENNER: 17 Q What rule do you rely on that for your 18 opinion? 19 A Just my own experience. 20 Q Besides your own experience you don't have 21 a OSHA, MIOSHA or EM 385 rule that you are relying 22 on for that opinion, correct? 23 A No; no, I don't. 24 Q Okay, thanks. Are you OSHA 10 qualified? 25 Let me ask you this way: Have you ever taken the</p>

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<p style="text-align: right;">Page 66</p> <p>1 OSHA 10 test?</p> <p>2 A No.</p> <p>3 Q Have you ever taken the OSHA 30 test?</p> <p>4 A No, but I'm authorized to teach both of</p> <p>5 those courses. I had to throw that in because the</p> <p>6 answer makes it sound as though I'm not qualified in</p> <p>7 both of those areas.</p> <p>8 Q I didn't ask you that. Can we just go</p> <p>9 back -- and just answer my questions, okay. If you</p> <p>10 can just answer the question I'd appreciate it. Do</p> <p>11 you agree that you never took the OSHA 10 test,</p> <p>12 correct?</p> <p>13 A Put on by federal OSHA, OSHA 10, no, I did</p> <p>14 not.</p> <p>15 Q Would you agree that you've never taken</p> <p>16 the OSHA 30 test?</p> <p>17 A I would agree that I've never taken the</p> <p>18 federal OSHA 30 test, yes.</p> <p>19 Q All right, thank you.</p> <p>20 A Can I add something to that answer, is</p> <p>21 that okay?</p> <p>22 Q No, it's not.</p> <p>23 A It's not okay?</p> <p>24 Q No, somebody will ask you.</p> <p>25 A I'll bring it up at trial, that's fine.</p>	<p style="text-align: right;">Page 68</p> <p>1 project site, correct? I'll reread it.</p> <p>2 A Thank you.</p> <p>3 Q On a multi-employer work site there are</p> <p>4 several subcontractors that are working on the</p> <p>5 project site, correct?</p> <p>6 A Well, not necessarily.</p> <p>7 Q Why do you say that?</p> <p>8 A You said there are several subcontractors</p> <p>9 working at the site; it could be several, it could</p> <p>10 be two, it could be ten.</p> <p>11 Q All right. How about this: On a</p> <p>12 multi-employer work site there is more than one</p> <p>13 subcontractor working at the project site, correct?</p> <p>14 A There would be more than one entity that</p> <p>15 had employees on the site, correct.</p> <p>16 Q Would the Fort Custer construction site</p> <p>17 that's the subject matter of this lawsuit be</p> <p>18 considered a MIOSHA multi-employer construction</p> <p>19 project work site?</p> <p>20 A In general, the site would, yes.</p> <p>21 Q Why do you use the word "general"?</p> <p>22 A The reason I say that is I want to make</p> <p>23 sure you understand the multi-employer policy --</p> <p>24 maybe I don't need to use the word "general." I</p> <p>25 would say yes, the site is a multi-employer site,</p>
<p style="text-align: right;">Page 67</p> <p>1 Q That's great. You can bring anything you</p> <p>2 want up at trial on direct examination. This is</p> <p>3 cross so if you can just answer my questions on</p> <p>4 cross. You're represented by other lawyers --</p> <p>5 A I understand.</p> <p>6 Q -- and I'm sure they'll do what they've</p> <p>7 got to do.</p> <p>8 A I understand.</p> <p>9 Q And I understand your position, okay.</p> <p>10 A I understand.</p> <p>11 Q Do you agree that in the multiple-employer</p> <p>12 OSHA directive dated December of 1999, it states</p> <p>13 that, "The general contractor is responsible for the</p> <p>14 overall safety of the construction site including</p> <p>15 all common work places," as in this situation with</p> <p>16 Ronnie Dancer's injury?</p> <p>17 MR. DAVIDSON: Object to form and</p> <p>18 foundation.</p> <p>19 MR. CUDNEY: I'll join.</p> <p>20 THE WITNESS: If what you're reading is</p> <p>21 something from the multi-employer policy that</p> <p>22 sounds correct.</p> <p>23 BY MR. BENNER:</p> <p>24 Q On multi-employer work sites there are</p> <p>25 several subcontractors that are working at the</p>	<p style="text-align: right;">Page 69</p> <p>1 correct.</p> <p>2 Q Thank you. Would this type of</p> <p>3 construction project also be referred to as a common</p> <p>4 workplace area since most of the multi-employer</p> <p>5 project work areas have many different</p> <p>6 subcontractors working in the same general area?</p> <p>7 And I'm speaking specifically about the Fort Custer</p> <p>8 project.</p> <p>9 MR. DAVIDSON: Object to form and</p> <p>10 foundation.</p> <p>11 MR. CUDNEY: I'll join.</p> <p>12 THE WITNESS: I think at times the site in</p> <p>13 general would have specific locations within it</p> <p>14 that would be considered common work areas,</p> <p>15 yes.</p> <p>16 BY MR. BENNER:</p> <p>17 Q Does the MIOSHA and/or OSHA multi-employer</p> <p>18 directive published in December of 1999 state that</p> <p>19 there are four different categories for construction</p> <p>20 employers working on multi-employer work sites?</p> <p>21 A Yes.</p> <p>22 Q I would like you to state your opinion</p> <p>23 about the different multi-employer safety</p> <p>24 responsibilities.</p> <p>25 A Okay.</p>

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<p style="text-align: right;">Page 70</p> <p>1 Q In this situation was the employer acting 2 as the general contractor in this case? 3 A Which employer? 4 Q Talking about Leidal-Hart. 5 A Were they acting as some sort of -- 6 Q General contractor. 7 A No. 8 Q Was the general contractor acting as a 9 controlling employer in this case? 10 A Specific to the operation of the scaffold, 11 no. 12 Q Does the general contractor have the 13 obligation to correct fall hazard exposure? 14 MR. DAVIDSON: Object to form and 15 foundation. 16 MR. CUDNEY: Join. 17 THE WITNESS: Does the general contractor 18 have responsibilities for fall protection 19 exposure? 20 BY MR. BENNER: 21 Q Fall hazard exposure. 22 A The GC has responsibilities to ensure that 23 the subcontractors have established their own 24 policies and their own procedures to ensure that 25 those fall hazards are mitigated, are protected,</p>	<p style="text-align: right;">Page 72</p> <p>1 at the construction site for this case? 2 A Yes. 3 Q Did the general contractor enforce his 4 safety program and make his subcontractors correct 5 the safety hazard exposures in a timely manner? 6 A Based on everything I reviewed I can't 7 think of any incidents that would tell me otherwise 8 than yes, they did. 9 Q Do you agree that OSHA 1926.16 states that 10 the general contractor cannot delegate his safety 11 responsibilities to the subcontractors? 12 A Yes. 13 Q Do you agree that the E 385 contract set 14 the threshold fall protection height at 6 feet above 15 the lower level for all work places including 16 workplace activities on the subject mast climbing 17 work platform at the time of this accident? 18 A I will have to double check but I don't 19 think that's necessarily true. 20 Q You want to double check? 21 A If I have it. 22 Q I'll give you my book if you want that. 23 A That would be great. I don't know if 24 there's a 6-foot rule, I can't remember, in the 25 EM 385. There is a separate rule in the federal</p>
<p style="text-align: right;">Page 71</p> <p>1 yes. 2 Q But should the general contractor realize 3 when the employer policies and procedures are 4 inadequate to remedy the risk of fall hazard 5 exposure? 6 MR. DAVIDSON: Object to form and 7 foundation. 8 THE WITNESS: I really don't understand 9 that question. 10 BY MR. BENNER: 11 Q My question to you is: As the general 12 contractor has overall site safety obligations on 13 the project does he have an obligation to make sure 14 that the policies that the employer Leidal-Hart has 15 in place are adequate to prevent the fall hazard 16 exposure? 17 A Yeah. The satisfying that is done through 18 general observations and their requirement that 19 their trade subcontractors establish and comply with 20 their AHAs as was done in this case. 21 Q What if the AHA is inadequate, shouldn't 22 that general contractor realize that? 23 A It's possible, it's possible. 24 Q Should the general contractor exercise 25 reasonable care to prevent and detect safety hazards</p>	<p style="text-align: right;">Page 73</p> <p>1 OSHA. I thought it was the same here. 2 Q Yeah, there is. 3 A I believe in Section 21 there is that 4 requirement. 5 Q You want to give me the page number too, 6 if you don't mind? 7 A Page 491. 8 Q Thanks. Do you agree that ANSI A92.10 9 dash 2009 Transport Platforms and ANSI A92.9 dash 10 1993 Mast Climbing Work Platforms both state that 11 the contractors shall erect, use, inspect, and 12 disassemble the subject lift platforms in strict 13 accordance with the manufacturer's users manual 14 requirements at the time of the accident? 15 A I'm familiar with the 10.9, not the 10.10. 16 Without looking at that and not having it to look at 17 it sounds familiar to me that it's part of the 18 regulation, yes, or the standard. 19 Q So you would agree with that? 20 A I believe it is correct. 21 Q Would you agree that the Hydromobile 22 manual provides and shows pictures of a bridging 23 system to be used with their Hydromobile unit? 24 A As I recall, yes, it does. 25 Q The bridging units come in different</p>

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<p style="text-align: right;">Page 74</p> <p>1 sizes, correct?</p> <p>2 A Correct.</p> <p>3 Q I'm going to show you the owners manual</p> <p>4 and direct you to the Operating Instructions, number</p> <p>5 five on page 6.</p> <p>6 A Number five on page 6 under Operating</p> <p>7 Instructions and it states, "Never modify the mast</p> <p>8 climbing work platform system or use substitute</p> <p>9 factory parts. This could adversely affect workers'</p> <p>10 safety, unit performance and void the warranty. In</p> <p>11 addition, this could lead to serious injury or</p> <p>12 death."</p> <p>13 Q Would you agree that the materials used to</p> <p>14 bridge the gap between the two scaffold units were</p> <p>15 not Hydromobile equipment?</p> <p>16 A I would agree they were not, yes.</p> <p>17 Q Would you agree that that's a violation of</p> <p>18 paragraph number five because they're using other</p> <p>19 materials?</p> <p>20 A No.</p> <p>21 Q Why not?</p> <p>22 A Well, because -- I'll read it again</p> <p>23 because it states that, "Never modify the mast</p> <p>24 climbing work platform system or use substitute</p> <p>25 factory parts." There's a difference there in using</p>	<p style="text-align: right;">Page 76</p> <p>1 bridging system that Hydromobile has, correct?</p> <p>2 MR. CUDNEY: Object to foundation.</p> <p>3 THE WITNESS: If a substitute factory part</p> <p>4 is a part substituted that is manmade that has</p> <p>5 come out of a factory that is likely -- and I</p> <p>6 believe, my opinion on this is the intent of</p> <p>7 Hydromobile in this is so you don't take a</p> <p>8 widget that should have gone on this model of a</p> <p>9 Hydromobile and put it on the -- Fraco is</p> <p>10 another maker of these -- put it on a Fraco,</p> <p>11 F-R-A-C-O mobile mast climber and so that</p> <p>12 you've got -- maybe it's a motor component, a</p> <p>13 hydraulic component that shouldn't be</p> <p>14 substituted out and create that danger, not the</p> <p>15 installation of a fully scaffold-compliant deck</p> <p>16 system. To me they're two different animals.</p> <p>17 BY MR. BENNER:</p> <p>18 Q Have you seen the bridging system that</p> <p>19 Hydromobile has in the owners operating manual that</p> <p>20 was provided to me by Better Built and Clark, have</p> <p>21 you seen it?</p> <p>22 A That particular document, no, I have not</p> <p>23 seen that.</p> <p>24 Q Why don't you take a look at it, okay,</p> <p>25 take a look at it.</p>
<p style="text-align: right;">Page 75</p> <p>1 a factory part -- a substitute factory part and</p> <p>2 using scaffold-compliant plank to form that bridge.</p> <p>3 To me, that's not a violation of what we see here.</p> <p>4 Q Is that the scaffolding plank that's</p> <p>5 recommended by Hydromobile?</p> <p>6 A I don't think it's a scaffolding plank</p> <p>7 that's not recommended or not allowed by</p> <p>8 Hydromobile.</p> <p>9 Q You show me in there where that's allowed</p> <p>10 by Hydromobile.</p> <p>11 MR. DAVIDSON: Object to the form of the</p> <p>12 question. The manual speaks for itself.</p> <p>13 THE WITNESS: I don't think in a company</p> <p>14 like Hydromobile they're going to tell you</p> <p>15 where you can't, they're usually not going to</p> <p>16 tell you where you can. In my experience with</p> <p>17 this kind of equipment, not a Hydromobile</p> <p>18 specifically, but I mean this kind of equipment</p> <p>19 in general for a construction site.</p> <p>20 BY MR. BENNER:</p> <p>21 Q I'm talking about Hydromobile equipment</p> <p>22 specifically, sir.</p> <p>23 A I understand. And it says "factory parts"</p> <p>24 in this manual.</p> <p>25 Q And the factory part for that manual is a</p>	<p style="text-align: right;">Page 77</p> <p>1 A I'm not surprised that these bridge</p> <p>2 drawings and other technical information, I'm not</p> <p>3 surprised that it's in here, this is the operating</p> <p>4 instructions. And the operators and assemblers, the</p> <p>5 builders would need this.</p> <p>6 But again, I don't see anywhere in --</p> <p>7 in my review of that document that you've got in</p> <p>8 your hands, which is the users manual, I don't see</p> <p>9 in there where you can't construct your own deck</p> <p>10 between platform sections using compliant</p> <p>11 scaffolding planks.</p> <p>12 Q Would you agree the Hydromobile</p> <p>13 operators's instruction provides for a description</p> <p>14 of a bridging unit to be used with the Hydromobile</p> <p>15 unit?</p> <p>16 A It does describe their own proprietary</p> <p>17 constructed bridge to be used between two adjacent</p> <p>18 scaffold sections, yes.</p> <p>19 Q We were previously talking about</p> <p>20 Hydromobile wanted the scaffolding planks to be</p> <p>21 clamped, correct, in your previous deposition?</p> <p>22 A In my previous deposition?</p> <p>23 Q I'm sorry, in your previous testimony</p> <p>24 today. Does the Hydromobile unit provide that the</p> <p>25 planks that the masons work on, that they should be</p>

20 (Pages 74 to 77)

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<p style="text-align: right;">Page 78</p> <p>1 clamped?</p> <p>2 MR. DAVIDSON: Object to the form and</p> <p>3 foundation.</p> <p>4 MR. CUDNEY: Join.</p> <p>5 THE WITNESS: In my review of that</p> <p>6 document not that it should, but it does</p> <p>7 provide an optional piece of equipment should</p> <p>8 you choose to do that.</p> <p>9 BY MR. BENNER:</p> <p>10 Q Okay, do you want to show me where it says</p> <p>11 it's optional?</p> <p>12 A You earlier gave me the page number, I</p> <p>13 believe it was 62. I think that's where you were</p> <p>14 talking about my previous testimony. I think it is</p> <p>15 62, I think you're right. These are -- yeah, it is,</p> <p>16 these are the anchoring -- no.</p> <p>17 MR. DAVIDSON: Look at the other manuals.</p> <p>18 THE WITNESS: It's probably in here. What</p> <p>19 I was looking at looks just like this.</p> <p>20 BY MR. BENNER:</p> <p>21 Q When you say "looks just like that" you're</p> <p>22 referring to the owners manual?</p> <p>23 A The one that I've got, that I looked at,</p> <p>24 correct.</p> <p>25 Q That's the owners manual, correct?</p>	<p style="text-align: right;">Page 80</p> <p>1 lift platform to be used in strict accordance with a</p> <p>2 manufacturer's user manual requirements including</p> <p>3 using its product bridge system with the outriggers</p> <p>4 so the boards can be properly connected to them at</p> <p>5 the time of the accident?</p> <p>6 A Again, as I stated in a couple answers</p> <p>7 ago, I don't see any evidence that Hydromobile</p> <p>8 disallows the use of compliant-certified scaffold</p> <p>9 planking in the place of their proprietary preformed</p> <p>10 bridge sections. I think that answers -- my answer</p> <p>11 would be no, I don't agree with that.</p> <p>12 Q It's your position that the lower work</p> <p>13 platform boards don't have to be clamped or wired to</p> <p>14 the outrigger?</p> <p>15 A Correct.</p> <p>16 Q Do you agree that the subject lift</p> <p>17 platform is by definition a common workplace as it</p> <p>18 is by its very nature all the trades, including</p> <p>19 subcontractors, should be required to use it in</p> <p>20 order to complete the subject masonry wall as</p> <p>21 required by the contract engineering drawings?</p> <p>22 MR. DAVIDSON: Object to form and</p> <p>23 foundation.</p> <p>24 MR. CUDNEY: Join.</p> <p>25 THE WITNESS: I think surely at times it</p>
<p style="text-align: right;">Page 79</p> <p>1 A It is, correct. On page 74 of the users</p> <p>2 manual -- and I have seen this -- this is their --</p> <p>3 the title of this section is "Universal Plank Safety</p> <p>4 Support." Underneath it though it does say</p> <p>5 "Optional," it's not a piece of required equipment.</p> <p>6 I think this is what you are referring to, I</p> <p>7 believe.</p> <p>8 MR. CUDNEY: Can we get these pages marked</p> <p>9 as an exhibit?</p> <p>10 MR. BENNER: If you want to go make</p> <p>11 copies.</p> <p>12 BY MR. BENNER:</p> <p>13 Q Do you agree that the manufacturer</p> <p>14 recommendation requires that the lower working</p> <p>15 platform be connected with the product's outriggers</p> <p>16 as illustrated and were required in the users</p> <p>17 manual?</p> <p>18 A The outriggers used to support the</p> <p>19 planking?</p> <p>20 Q Right.</p> <p>21 A On the work platform?</p> <p>22 Q Right.</p> <p>23 A Should be, yes.</p> <p>24 Q Do you agree that the manufacturer's user</p> <p>25 manual for the subject lift platform requires the</p>	<p style="text-align: right;">Page 81</p> <p>1 has the potential to be a common work area,</p> <p>2 clearly.</p> <p>3 BY MR. BENNER:</p> <p>4 Q Do you agree that the general contractor</p> <p>5 as the controlling contractor has the overall</p> <p>6 authority on the construction project?</p> <p>7 MR. DAVIDSON: Object to form and</p> <p>8 foundation.</p> <p>9 MR. CUDNEY: Join.</p> <p>10 THE WITNESS: As the overall authority on</p> <p>11 the --</p> <p>12 BY MR. BENNER:</p> <p>13 Q On the construction project.</p> <p>14 A The general safety authority?</p> <p>15 Q Yes.</p> <p>16 A I would agree with that.</p> <p>17 Q Would you agree that the general</p> <p>18 contractor has the responsibility to sequence the</p> <p>19 subcontractors' workplace activities at the time of</p> <p>20 the accident?</p> <p>21 A Sequencing with respect to the various</p> <p>22 trades, yes.</p> <p>23 Q Would you agree that if this proper</p> <p>24 sequencing of the subcontractors' workplace</p> <p>25 activities had occurred then the subject injuries to</p>

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<p style="text-align: right;">Page 82</p> <p>1 Ronnie Dancer would not have happened?</p> <p>2 MR. DAVIDSON: Object to form and</p> <p>3 foundation.</p> <p>4 MR. CUDNEY: Join.</p> <p>5 THE WITNESS: Are you referring to the</p> <p>6 installation of the clamp and the 2-by-4?</p> <p>7 BY MR. BENNER:</p> <p>8 Q No. I'm just talking about the sequencing</p> <p>9 of the work.</p> <p>10 A No, I don't know where the sequential</p> <p>11 issue interjected itself into the accident so my</p> <p>12 answer would have to be no.</p> <p>13 Q Are you aware that Eric Koshurin gave</p> <p>14 notice to the general contractor and/or Cory Hanson</p> <p>15 approximately two weeks before Ronnie Dancer's</p> <p>16 injuries that the boards were loose and not tied</p> <p>17 down or were flipping up prior to Ronnie Dancer's</p> <p>18 injury?</p> <p>19 MR. DAVIDSON: Object to form and</p> <p>20 foundation.</p> <p>21 THE WITNESS: I do recall that, yes.</p> <p>22 MR. CUDNEY: I'll join.</p> <p>23 THE WITNESS: From Mr. Koshurin?</p> <p>24 MR. BENNER: Yes.</p> <p>25 THE WITNESS: Yes.</p>	<p style="text-align: right;">Page 84</p> <p>1 A I don't recall if he said that. If you</p> <p>2 say it's in there it's in there. I do recall</p> <p>3 discussions of the planks, yes.</p> <p>4 Q And the reason he went to Cory Hanson was</p> <p>5 he was concerned about the safety of the planking,</p> <p>6 correct?</p> <p>7 A I believe that's correct, yes.</p> <p>8 Q Once Cory Hanson had knowledge that the</p> <p>9 planking was unsafe he had an obligation to make</p> <p>10 sure the planking was corrected, right?</p> <p>11 A Well, it should have been looked at. I</p> <p>12 don't know whether Cory Hanson looked at the</p> <p>13 planking or not.</p> <p>14 Q My question is: Cory Hanson has an</p> <p>15 obligation as the site safety and health person to</p> <p>16 inspect that planking after he's put on notice by</p> <p>17 Eric Koshurin about Koshurin almost falling from</p> <p>18 this planking, correct?</p> <p>19 A The only way I can answer that, if I was</p> <p>20 Cory Hanson I would either want to go look at it</p> <p>21 myself or I would want to ask my competent --</p> <p>22 Mr. Martin, I believe was his name -- to take a look</p> <p>23 at that, yes.</p> <p>24 Q Is there any testimony that Cory Hanson</p> <p>25 did either of those things that you'd want to?</p>
<p style="text-align: right;">Page 83</p> <p>1 BY MR. BENNER:</p> <p>2 Q Do you agree that Cory Hanson had an</p> <p>3 obligation to make sure that the boards were not</p> <p>4 loose and were tied down after he received notice</p> <p>5 this from Eric Koshurin?</p> <p>6 MR. DAVIDSON: Object to form and</p> <p>7 foundation.</p> <p>8 MR. CUDNEY: Join.</p> <p>9 THE WITNESS: They were using 16-footers</p> <p>10 which there's no requirement for them to be</p> <p>11 tied down, number one. Number two, on a</p> <p>12 scaffold system such as this where you've got</p> <p>13 planks that are overlaying bearers, the</p> <p>14 movement of boards is a common occurrence.</p> <p>15 They're never completely flat, there's</p> <p>16 always going to be a little bit of jiggling --</p> <p>17 sorry, it's a bad word, hard to spell -- and a</p> <p>18 little bit of possibly teeter-tottering. It's</p> <p>19 a common thing that doesn't necessarily mean</p> <p>20 you've got a hazard there, in my own experience</p> <p>21 on scaffolds.</p> <p>22 BY MR. BENNER:</p> <p>23 Q Eric Koshurin told Cory Hanson that he</p> <p>24 almost fell because the boards were loose and not</p> <p>25 tied down, correct?</p>	<p style="text-align: right;">Page 85</p> <p>1 A No.</p> <p>2 Q Would you expect that that should be in</p> <p>3 any safety document filled out by Cory Hanson that</p> <p>4 he took steps to correct the hazardous condition</p> <p>5 that Eric Koshurin told him about?</p> <p>6 MR. CUDNEY: Object to foundation.</p> <p>7 THE WITNESS: It might wind up on a daily</p> <p>8 report and it might not, it depends. It</p> <p>9 certainly has the potential to wind up in</p> <p>10 writing on a report, yes.</p> <p>11 BY MR. BENNER:</p> <p>12 Q Do you know why it didn't?</p> <p>13 A No.</p> <p>14 Q In your opinion should it have been</p> <p>15 written down because that was a safety hazard?</p> <p>16 A I'm not sure it should have been written</p> <p>17 down; one of two actions would be appropriate.</p> <p>18 (Exhibit No. 6 marked for</p> <p>19 identification.)</p> <p>20 BY MR. BENNER:</p> <p>21 Q I'm going to show you what's been marked</p> <p>22 as Exhibit Number Six. Can you take a look at that,</p> <p>23 please.</p> <p>24 A Sure.</p> <p>25 Q Can you tell me what Exhibit Six is.</p>

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<p style="text-align: right;">Page 86</p> <p>1 A It's looking up, this was taken on the 2 date of the accident, it's beneath the plank 3 section, the plank bridge between two sections and 4 it's looking straight up the wall at the work 5 platform. 6 Q Are these the outriggers that are sticking 7 out that we see? 8 A They are, correct. 9 Q Are the outriggers supposed to have pins? 10 A They do have pins on the exterior, yes. 11 Q Are all the outriggers of the same length? 12 A No. 13 Q Does that create a hazard by the 14 outriggers not all being the same length? 15 A Well, there's the potential on the 16 outboard, if it's short, the outboard board to roll 17 off. I don't know if it's such a -- it certainly 18 creates a potential hazard, yes. 19 Q The short outrigger that we are looking at 20 is in the area where Ronnie Dancer fell, correct? 21 MR. DAVIDSON: Object to form and 22 foundation. 23 MR. CUDNEY: Join. 24 THE WITNESS: From what I understand -- I 25 don't know exactly, I don't think anyone knows</p>	<p style="text-align: right;">Page 88</p> <p>1 supported by this outrigger, correct? 2 A It creates a potential hazard, yes. 3 Q The higher you get the greater the hazard, 4 the bigger the injury? 5 A Bigger the injury, I don't think the 6 greater the hazard. 7 Q The hazard remains the same and you agree 8 that you can suffer significant injury if you have a 9 fall from 6 feet, correct? 10 A Again, we're back to the -- you're trying 11 to pin me down on the effects of a fall on a human 12 body. I'm not a biomechanical engineer. Could 13 someone suffer? I've already told you that someone 14 could be injured from a fall from a foot. 15 Q You're being held out here as the safety 16 expert on a job site -- 17 A Exactly. 18 Q -- so you're the guy to ask. Don't you 19 agree as a safety person with all your background 20 and education that you can suffer a significant 21 injury when you fall from 6 feet based upon your 22 training, education, and reading? 23 A I would agree you can be injured from that 24 height. 25 Q Just looing at Exhibit Number Six and</p>
<p style="text-align: right;">Page 87</p> <p>1 exactly, only the crane operator saw him 2 fall -- but generally speaking, it appears to 3 be in the general area where he fell, yes, on 4 the work platform. 5 BY MR. BENNER: 6 Q This short outrigger would give the 7 appearance that the outer board was supported when, 8 in fact, it wasn't, correct? 9 A It would be partially supported there at 10 that point. 11 Q And it would be partially unsupported too, 12 right? 13 A I don't want to say it's -- I don't think 14 a board would be unsupported, it would still be 15 supported. It would be supported with a length of 16 outrigger that wasn't as long as it possibly could 17 be. 18 Q That's not the ideal situation when you're 19 30 feet up in the air to have an outrigger that 20 short, correct, that's created a hazard, a potential 21 for a hazard, right? 22 A I think it creates a potential for a 23 hazard, not a hazard as great as one might think. 24 Q It's a big hazard when you're 30 feet in 25 the air when the entire board is not going to be</p>	<p style="text-align: right;">Page 89</p> <p>1 looking at the planking on the right side when 2 you're looking at the picture at the top on the work 3 area, the walk area for the masons? 4 A Sure, okay. 5 Q Are you saying that those planks in the 6 right-hand corner in the work area for the masons, 7 that's correctly planked? 8 A No, I didn't say that. 9 Q Would you agree that those planks aren't 10 correctly planked in the right-hand corner? 11 A The overlap on those is excessive. I 12 really can't tell how many boards we have there. 13 I'm assuming this happened right after the accident, 14 certain number of boards came down right after Mr. 15 Dancer. I don't think anyone really knows exactly 16 what was in place there so to comment on that, I 17 don't know, I can't tell. 18 Q As it appears in that picture, you would 19 agree that the planks in the right-hand corner or 20 the work platform area for the masons is not 21 correctly planked, correct? 22 A I believe so. I guess Mr. Dancer had done 23 this right before the accident so I would agree they 24 appear to be incorrectly placed. 25 Q If you could just answer my question. My</p>

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<p style="text-align: right;">Page 90</p> <p>1 question simply is: Do you agree that the planks in 2 the upper right-hand corner which are the work 3 platforms for the masons are not correctly planked? 4 MR. CUDNEY: Asked and answered. 5 MR. DAVIDSON: Same. 6 THE WITNESS: It appears those are 7 incorrect, yes, based on the photograph. 8 BY MR. BENNER: 9 Q Have you seen the daily reports that show 10 that the electricians are chasing the masons? 11 A I have seen daily reports, whether they 12 show the electricians chasing the masons, I don't 13 recall gleaning that from the documents. 14 Q The daily reports specifically say 15 "electricians chasing masons" in July and August; 16 you don't remember ever seeing that? 17 A Is this the ones out of the Army's RCS 18 system or -- I can't remember the acronym. These 19 are the reports, the compilation reports that are 20 the summary that are all fed into by all the subs? 21 Q I've never seen those. Do you have those? 22 A They're somewhere in the documents I've 23 seen. 24 Q You've got the Corps of Engineers' 25 documents showing that?</p>	<p style="text-align: right;">Page 92</p> <p>1 A Of course. 2 Q If you were aware of that as the site 3 safety person would you take steps to remedy that 4 safety hazard? 5 A Yes. 6 Q Would you agree that using the Hydromobile 7 bridges would have prevented the injuries that 8 Ronnie Dancer suffered? 9 MR. CUDNEY: Object to foundation. 10 MR. DAVIDSON: I'll join, also object to 11 form. 12 THE WITNESS: It depends. If the bridge 13 comes with preplanked work platforms it would 14 have the potential to. If those bridges have 15 got just -- are "outriggered" and you still 16 have to plank those or attach outriggers and 17 plank those it wouldn't make a difference. 18 BY MR. BENNER: 19 Q The Hydromobile bridges came with solid 20 preplanked surface; would you agree that that would 21 have prevented Ronnie Dancer's injuries? 22 MR. DAVIDSON: Object to form and 23 foundation. 24 MR. CUDNEY: Join. 25 THE WITNESS: This is a preplanked work</p>
<p style="text-align: right;">Page 91</p> <p>1 A They should be on that disk, whatever 2 daily reports I have seen. 3 Q I'm talking about the daily reports that 4 were submitted by Clark and Better Built. Are we 5 talking about the same thing or are talking about 6 something else? 7 A These are reports that address what each 8 sub was doing, what kind of equipment, numbers of 9 people. 10 Q Right. In those documents it shows that 11 electricians chasing masons; you don't remember 12 seeing that? 13 A I don't. 14 Q Would you be concerned if a safety 15 violation regarding scaffolding imperiled five 16 workers where it would present a height which 17 presents a risk of injury? 18 A If there was a threat to five workers? 19 Q Yeah. 20 A Yes. 21 Q If it was two workers or one worker, if 22 there was a safety violation relative to the 23 scaffolding and would present a risk of injury to 24 that one worker or two workers, would you be 25 concerned about their safety?</p>	<p style="text-align: right;">Page 93</p> <p>1 platform surface? 2 BY MR. BENNER: 3 Q Yes. 4 A I would presume the boards could still 5 be -- would still have to, number one, have to be 6 removed if he's going to go around the clamp during 7 his raising activity. There would still be some 8 disruption of the planks. That would require for 9 Mr. Dancer to reinstall those properly. So there's 10 still the possibility that they would be improperly 11 installed after his raising. 12 Q If I show you the pictures from the 13 bridging system on pages 40, 41, and 42, would you 14 agree that these pictures do not appear to require 15 you to remove the planking? 16 MR. DAVIDSON: Object to form and 17 foundation. 18 MR. CUDNEY: I'll join. 19 THE WITNESS: I might be able to based on 20 these drawings. I don't know, I can't tell 21 from these whether or not there is -- these 22 kinds of systems allow for different work 23 platform depths, in other words, the number of 24 boards making up the work platform. 25 As I look at these drawings I don't see</p>

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<p style="text-align: right;">Page 94</p> <p>1 any discussions of that. It looks to be just 2 the main platform in this bridge. Therefore, 3 you would have to add outriggers and boards to 4 that which would mean still, you're right back 5 where Mr. Dancer was for his original -- for 6 the actual event. 7 BY MR. BENNER: 8 Q Would you agree that those boards would be 9 clamped? 10 MR. DAVIDSON: Object to form and 11 foundation. 12 THE WITNESS: No, I wouldn't agree with 13 that based on these drawings. 14 BY MR. BENNER: 15 Q Who are the competent persons that were 16 given to the Corps of Engineers for the Hydromobile? 17 A I know Mr. Martin was competent and one 18 other worker on Leidal's staff, I can't recall the 19 name. There were two names, Martin and another. 20 Q There is nothing in writing to the Corps 21 of Engineers saying that Ronnie Dancer was the 22 competent person for the scaffolding, correct? 23 A Not that I'm aware of, no. 24 Q Do you agree that Cory Hanson was not 25 qualified as a site safety person for this project</p>	<p style="text-align: right;">Page 96</p> <p>1 qualified to be the site safety person on this 2 project based upon what E 385 requires? 3 MR. CUDNEY: Object; asked and answered. 4 THE WITNESS: I have answered that and I 5 think my answer was that he did not fill all 6 the requirements that were there, contractually 7 there for that particular position, that's 8 true. 9 BY MR. BENNER: 10 Q You agree you haven't seen anything where 11 Cory Hanson was a site safety person on the project 12 the size of the Fort Custer job, correct? 13 A Correct. 14 Q And that he didn't qualify under any 15 training under E 385 where he would qualify as the 16 site safety person, correct? 17 A In that he has 30 but the 30 didn't 18 comply, I would say you're probably correct. 19 Q Would you have appointed him the site 20 safety person based upon what you know about his 21 training and education and failure to comply with 22 E 385 to this project? 23 A I don't know. 24 MR. DAVIDSON: Object to form and 25 foundation.</p>
<p style="text-align: right;">Page 95</p> <p>1 and Better Built and/or Clark were negligent in 2 having him appointed the site safety person for the 3 Fort Custer project? 4 MR. DAVIDSON: Object to form and 5 foundation. 6 MR. CUDNEY: Join. 7 THE WITNESS: Can you repeat it, please? 8 BY MR. BENNER: 9 Q Sure. If Cory Hanson was not qualified to 10 be the site safety person on this project would you 11 agree that Better Built and/or Clark or both were 12 negligent in having him appointed to site safety 13 person at the Fort Custer job? 14 MR. DAVIDSON: Object to form and 15 foundation; part of it's previously asked, it's 16 a compound question, also calls for legal 17 conclusion. Go ahead if you can answer. 18 MR. CUDNEY: Join. 19 THE WITNESS: If they were negligent by 20 putting Cory Hanson in that position? 21 "Negligence" is a technical term, or excuse me, 22 a legal term. I don't know, I don't know how 23 to answer that. 24 BY MR. BENNER: 25 Q Do you agree that Cory Hanson was not</p>	<p style="text-align: right;">Page 97</p> <p>1 BY MR. BENNER: 2 Q When you say you don't know what do you 3 mean? 4 A I would have to meet him, interview him, 5 talk to him, find out what kind of knowledge he has. 6 It's easy for me to sit here and judge Cory Hanson, 7 I've never met Cory Hanson, never worked with Cory 8 Hanson. 9 Q Sure, you're making all sorts of judgments 10 as we sit here today. I'm just asking you for 11 another judgment. Here's my question: We know that 12 he didn't pass the OSHA 30, correct, he didn't take 13 the test? 14 A He didn't take the test, correct. 15 Q We know that he was an estimator on this 16 project before, correct? I'm sorry, let me rephrase 17 that. 18 A Another project. 19 Q We know that the job before this he was 20 the estimator on the project, correct? 21 A Correct. 22 Q We know that his education is as an IT 23 person, correct? 24 A Correct. 25 Q We know that he doesn't possess a</p>

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<p style="text-align: right;">Page 98</p> <p>1 certified safety professional or safety and health 2 degree, correct? 3 A Correct. 4 Q We know that Cory Hanson doesn't qualify 5 under E 385 to be appointed the site safety person, 6 correct? 7 A Correct. 8 Q Knowing all those things would you have 9 appointed Cory Hanson to be the site safety person 10 pursuant to E 385 on this project? 11 MR. DAVIDSON: Object to form and 12 foundation. 13 MR. CUDNEY: Join. 14 THE WITNESS: Based on what we just went 15 through, specifically that and not having met 16 Mr. Hanson, no, I would not put him in that 17 job. 18 BY MR. BENNER: 19 Q Okay, thanks. Have you seen any evidence 20 that there was a horizontal cable on the scaffold? 21 A No. 22 Q Do you agree that OSHA requires the 23 horizontal cable must be designed by a qualified 24 person? 25 A Are we talking about a lifeline,</p>	<p style="text-align: right;">Page 100</p> <p>1 on ground level. But again, I think the things Cory 2 Hanson needs to see would be visible from the 3 ground. 4 Q Do you agree that EM 385 dash one dash one 5 22.B.08 sub paren 2 states: Planking shall be 6 supported or raised to prevent excessive spring or 7 deflection and secured and supported to prevent 8 loosening, tipping or displacement? 9 A I don't know. Can you give me the cite 10 again? 11 Q Sure. 12 A I know it's 22. 13 Q It's 22B08 -- might be sub paren 2. 14 A That was 22.B.08C as in Charlie? 15 Q No, B. B as in Bravo, B11. 16 A Maximum permissible span? I don't know, I 17 don't know. Whether or not that's true, I don't 18 know. 19 Q I'm just asking: Is that what it says? 20 A It says what it says. 21 MR. CUDNEY: Can you read what it says? 22 THE WITNESS: What I've got is the 23 maximum -- this is 22B08 paragraph 2. 24 BY MR. BENNER: 25 Q Look at C.</p>
<p style="text-align: right;">Page 99</p> <p>1 horizontal lifeline? 2 Q Yes, right? 3 A Horizontal lifeline would be, there's no 4 requirement to have one up there, but if it is, yes, 5 it needs to be properly -- 6 Q Should the site safety person, that being 7 Cory Hanson, get on the scaffold to inspect it? 8 A I don't think necessarily. 9 Q Would it be a good safety practice for the 10 site safety person to get on the scaffold to inspect 11 it? 12 A I think the things that Mr. Hanson needs 13 to see which are guardrails, decking, planks, those 14 kinds of things, he could see from ground level. 15 That device is not always up 35 feet as it was on 16 the day of the accident. So there would be times 17 where a lot of that would be very visible to a 18 person on the ground. So no, I don't think 19 necessarily Cory Hanson should have been up on the 20 scaffolding. 21 Q I really didn't ask you necessarily, I 22 asked you would it be a good safety practice for the 23 site safety and health person to get up on the 24 scaffold and see how it's actually set up? 25 A He would see more up there than he would</p>	<p style="text-align: right;">Page 101</p> <p>1 A As in 2C? 2 Q I just have 08C. 3 A It says, "Planking shall be secured to 4 prevent loosening, tipping, or displacement and 5 supported or braced to prevent excessive spring or 6 deflection. Intermediate beams shall be provided to 7 prevent dislodgement of planks due to deflection." 8 Then it says, "See 24A04." Let me 9 look at that real quick. It reads, "Means of access 10 shall not be loaded beyond the maximum intended load 11 for which they were designed or beyond their 12 manufacturer-rated capacity. When loaded planking 13 and decking shall not deflect more than 1/60th of 14 the span length." That's really not that permanent, 15 okay. 16 Q You agree that the 22B08C states, 17 "Planking shall be secured to prevent loosening, 18 tipping or displacement and supported or braced to 19 prevent excessive spring or deflection." 20 A That's what it says, it does, correct. 21 Q Do you believe in this case that this 22 planking meets the requirements of 22B08C? 23 A In a way it would in that the two methods 24 of securing boards of 16 feet or longer. One is an 25 actual physical restraint as in a clamp or ties, and</p>

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<p style="text-align: right;">Page 102</p> <p>1 the other is to lap them. These boards were being 2 lapped and that is a form of stabilization of the 3 board. 4 Q Would you agree that 22N01 mandates 5 compliance with the operation manual of the 6 Hydromobile scaffold from which Ronnie Dancer fell 7 on August 9th, 2010? It's 22N.01. 8 A It indicates compliance with? 9 Q Mandated compliance with the operation 10 manual? 11 A That this particular clause -- 12 MR. DAVIDSON: He's referring you to 13 22N01, I believe. 14 THE WITNESS: Would you like me to read 15 that one? 16 BY MR. BENNER: 17 Q No, I'm just saying: Do you agree that 18 that's what it requires? Do you agree that EM 385 19 dash one dash one, Section 22N.01 mandated 20 compliance with the operations manual of the 21 Hydromobile scaffold from which Ronnie Dancer fell 22 on August 9th, 2010? 23 A It appears to say that, yes. 24 Q Do you agree the Hydromobile scaffold 25 manual specifically required that the planking be</p>	<p style="text-align: right;">Page 104</p> <p>1 A Yes. 2 Q Would you agree that the daily logs of the 3 construction identify significant workers in excess 4 of 20 from several trades including bricklayers, 5 laborers, electricians, plumbers, cement 6 contractors, and carpenters which were using the 7 Hydromobile scaffold? 8 A As I look at the dailies there's no 9 indication that they were using the Hydromobile. 10 Q Bricklayers weren't using the Hydromobile? 11 A No, other than clearly Leidal was using 12 the Hydromobile. These other subs that you're 13 talking about, no indication on there of the days 14 they were using that particular scaffold. 15 Q There is information that the cement 16 masons were using the scaffold, correct, in the 17 safety reports done by Cory Hanson? 18 A Yes. 19 Q It's also in the safety manual that the 20 carpenters were using the scaffolding in Cory Hanson 21 safety logs, correct? 22 A Correct. 23 Q All these trades were exposed to -- were 24 using the scaffolding at various times, correct? 25 A There were some trades that used it at</p>
<p style="text-align: right;">Page 103</p> <p>1 secured to outriggers with plank safeties? 2 A No. 3 Q Do you agree that the Hydromobile scaffold 4 outriggers needed to be properly extended and 5 secured? 6 A The outriggers? 7 Q Right. 8 A Yes. 9 Q Do you agree that at least two competent 10 workers per motorized scaffold unit shall handle all 11 raising and descent operations? 12 A In that the Activity Hazard Analysis 13 included a two-worker requirement, I would say yes. 14 Q Do you agree that prior to the time that 15 Ronnie Dancer fell the defendants, including their 16 designated safety employees, knew of and observed 17 that work site employees were not using adequate 18 fall protection devices? 19 A There were some indications in the 20 documents that there had been workers or a worker 21 observed without fall protection on at some point in 22 the operation that required it, yes. I think it was 23 one that may have been caught by Mr. Hanson or -- 24 but yes, to answer your question. 25 Q You've reviewed the daily logs, right?</p>	<p style="text-align: right;">Page 105</p> <p>1 various times, correct. 2 Q We've already enumerated those trades, 3 correct? 4 A Correct. 5 Q You agree that using the scaffolding at 6 the Fort Custer project when you have an 7 insufficient work platform on the scaffold creates a 8 high degree of risk to everyone above the 6 feet 9 ground level, correct? 10 MR. DAVIDSON: Objection; form and 11 foundation. 12 MR. CUDNEY: Join. 13 THE WITNESS: It would create a hazard to 14 anyone on the work platform when they are above 15 6 feet, I would agree with that. 16 BY MR. BENNER: 17 Q That would be a high degree of risk, 18 correct? 19 MR. DAVIDSON: Object to form and 20 foundation. 21 THE WITNESS: I don't know if it was high 22 or medium or there would be a degree of risk, 23 literally. 24 BY MR. BENNER: 25 Q The danger posed would be that of falling,</p>

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<p style="text-align: right;">Page 106</p> <p>1 correct?</p> <p>2 A Correct.</p> <p>3 Q That danger would be caused by the</p> <p>4 instability of the planking, correct?</p> <p>5 A It could be the instability of the</p> <p>6 planking, that's one potential source of that fall.</p> <p>7 Q Would you agree that the job built</p> <p>8 bridging between the Hydromobile units were not</p> <p>9 equipped with outriggers to support the planking?</p> <p>10 A I believe that's true.</p> <p>11 Q Would you agree that this left an</p> <p>12 expansion planking more than 12 feet long completely</p> <p>13 unsupported?</p> <p>14 A I can't agree with that.</p> <p>15 Q Looking at the Exhibit Number Six, looking</p> <p>16 at the second outrigger from the right and the first</p> <p>17 outrigger -- or the outrigger next to it, can you</p> <p>18 give me what the distance is? I'm pointing to this</p> <p>19 outrigger which is the second outrigger and this</p> <p>20 outrigger. Do you know what the distance there is?</p> <p>21 A No, I don't.</p> <p>22 Q Can you give me an estimate; are we</p> <p>23 talking 6 feet, 10 feet?</p> <p>24 A Without measuring it I couldn't tell you,</p> <p>25 just to glance at it. I really wouldn't want to</p>	<p style="text-align: right;">Page 108</p> <p>1 A The hazard, in my mind, creates more of</p> <p>2 the possibility of a increase of span on the board,</p> <p>3 therefore you increase the stress applied to the</p> <p>4 board. So it would increase the possibility that</p> <p>5 you could fail the board, actually make it break.</p> <p>6 That would require a lot of weight</p> <p>7 but increasing the span would be my concern with</p> <p>8 that, which is not an indication that it had</p> <p>9 anything to do with this accident but.</p> <p>10 Q Let me say, the failure to have this</p> <p>11 outrigger present there, that would be something</p> <p>12 that would be readily visible to Cory Hanson,</p> <p>13 correct?</p> <p>14 A Not in a broad-brush look; a closer</p> <p>15 inspection from below it should be visible, yes.</p> <p>16 Q We're talking about the area between the</p> <p>17 two scaffold units, correct?</p> <p>18 A On the work platform?</p> <p>19 Q Yes.</p> <p>20 A Correct.</p> <p>21 Q If Cory Hanson would have walked</p> <p>22 underneath the scaffolding and looked up he would</p> <p>23 have seen that there was an outrigger missing there,</p> <p>24 correct.</p> <p>25 MR. DAVIDSON: Object to form and</p>
<p style="text-align: right;">Page 107</p> <p>1 guess at it.</p> <p>2 Q Should there be another outrigger between</p> <p>3 these two outriggers where the gap that we're</p> <p>4 talking about?</p> <p>5 A It appears there should be, yes.</p> <p>6 Q Would you agree that's an unsafe condition</p> <p>7 not to have a second outrigger there?</p> <p>8 A Yes.</p> <p>9 Q Thank you. The reason it's unsafe is</p> <p>10 because it increases the -- not having enough</p> <p>11 support for the planking, correct?</p> <p>12 A It would reduce the support for the</p> <p>13 planking, correct.</p> <p>14 Q By reducing support for the planking</p> <p>15 you're creating a hazard, correct?</p> <p>16 A I would think it would increase the</p> <p>17 possibility of a failure. Yeah, there would be a</p> <p>18 hazard.</p> <p>19 Q The hazard would be a tipping event or the</p> <p>20 board falling, correct?</p> <p>21 A I'm not sure it would necessarily relate</p> <p>22 to a tipping or a falling.</p> <p>23 Q What's the hazard created by not having a</p> <p>24 plank there -- not having an outrigger there that</p> <p>25 creates a hazard?</p>	<p style="text-align: right;">Page 109</p> <p>1 foundation.</p> <p>2 MR. CUDNEY: Join.</p> <p>3 THE WITNESS: Assuming there was one at</p> <p>4 the time -- are we talking previous to the</p> <p>5 accident or after the accident?</p> <p>6 BY MR. BENNER:</p> <p>7 Q Previous to the accident.</p> <p>8 A I don't know. I don't know if he would</p> <p>9 have seen one missing or if the outrigger came down</p> <p>10 during the accident, I don't have any idea. Really,</p> <p>11 everything that came down is a result of failure.</p> <p>12 Q Did you read any place that the outrigger</p> <p>13 came down?</p> <p>14 A I don't think I remember that but I don't</p> <p>15 believe so.</p> <p>16 Q Would you agree that there is nothing in</p> <p>17 any deposition that you have read that said: Oh,</p> <p>18 boy, an outrigger came down on August 9, 2010 in the</p> <p>19 area where Ronnie Dancer fell?</p> <p>20 A I don't recall that.</p> <p>21 Q Would you agree that if Cory Hanson would</p> <p>22 have looked up he could have seen that the outrigger</p> <p>23 was not there on at least August 9?</p> <p>24 A On the day of the accident, right. If one</p> <p>25 was there and he looked up I believe it would be</p>

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<p style="text-align: right;">Page 110</p> <p>1 visible, yes. If it's not there it would also be --</p> <p>2 should be apparent, yes.</p> <p>3 Q Do you have any reason to believe that</p> <p>4 there was ever an outrigger there prior to this fall</p> <p>5 by Ronnie Dancer?</p> <p>6 MR. DAVIDSON: Object to form and</p> <p>7 foundation.</p> <p>8 MR. CUDNEY: Join.</p> <p>9 THE WITNESS: No.</p> <p>10 BY MR. BENNER:</p> <p>11 Q Would you agree that if a bridging system</p> <p>12 was used, specifically a Hydromobile bridging</p> <p>13 system, that would have taken care of this lack of</p> <p>14 an outrigger being there?</p> <p>15 MR. DAVIDSON: Object to form and</p> <p>16 foundation.</p> <p>17 MR. CUDNEY: Me too.</p> <p>18 THE WITNESS: Not necessarily, no.</p> <p>19 MR. BENNER: Can we take a break.</p> <p>20 (Brief recess.)</p> <p>21 BY MR. BENNER:</p> <p>22 Q Did you read Don Volk's deposition where</p> <p>23 he agrees on page 75 that you're not supposed to use</p> <p>24 overlapping boards for the bridging?</p> <p>25 A Yes, to answer your question I did read</p>	<p style="text-align: right;">Page 112</p> <p>1 your lawyer?</p> <p>2 Answer is "Yes."</p> <p>3 A Okay.</p> <p>4 Q His testimony there is you're not supposed</p> <p>5 to use overlapping boards as the bridging, correct?</p> <p>6 A That's his testimony, yes.</p> <p>7 Q He doesn't say that there is some other</p> <p>8 alternative allowed by any manual, does he?</p> <p>9 A No.</p> <p>10 Q Don Volk is the safety person for Clark,</p> <p>11 correct?</p> <p>12 A Correct.</p> <p>13 Q Do you agree with Don Volk that the site</p> <p>14 safety person has to review the owners manual for</p> <p>15 the Hydromobile scaffold?</p> <p>16 A That was asked and answered.</p> <p>17 Q Your answer was?</p> <p>18 A My answer was not necessarily, no. The</p> <p>19 reason I say "not necessarily" I think a document</p> <p>20 like that in my experience and having overseen</p> <p>21 safety on a site is that it would be a reference</p> <p>22 guide. It wouldn't be something you'd necessarily</p> <p>23 need to sit down and completely digest. That's why</p> <p>24 you hire your trade experts.</p> <p>25 Q That's why you hire competent safety</p>
<p style="text-align: right;">Page 111</p> <p>1 that and I've got a note here in my outline about</p> <p>2 that. I believe what Mr. Volk -- my interpretation</p> <p>3 of what he was talking about there was the very</p> <p>4 thing we've already discussed. That is, the factory</p> <p>5 parts issue and whether or not the substitution of</p> <p>6 scaffold planking violates that. I believe that's</p> <p>7 where he was going there, as I read it that's where</p> <p>8 I thought he was going.</p> <p>9 Q The question was, on page 75, line 6, "Are</p> <p>10 you aware that you're not supposed to use</p> <p>11 overlapping boards as bridging; that's a violation</p> <p>12 of the owner and users manual for the Hydromobile?"</p> <p>13 Answer, line 13, "No, I wasn't fully</p> <p>14 aware of that."</p> <p>15 Line 16, Question, "Did you become</p> <p>16 aware of that afterwards?"</p> <p>17 Answer, "Yes."</p> <p>18 "And how did you become aware of</p> <p>19 that?"</p> <p>20 Answer, "I was just told recently."</p> <p>21 Line 20, "Who told you that</p> <p>22 recently?"</p> <p>23 Line 21, "In this morning's</p> <p>24 discussion."</p> <p>25 Line 22, Question, "That would be</p>	<p style="text-align: right;">Page 113</p> <p>1 people too. Do you disagree with Don Volk when he</p> <p>2 says that Cory Hanson should have reviewed the</p> <p>3 owners manual?</p> <p>4 MR. DAVIDSON: Objection; asked and</p> <p>5 answered.</p> <p>6 THE WITNESS: I'm not going to disagree --</p> <p>7 that's Mr. Volk's opinion and I've got my own.</p> <p>8 BY MR. BENNER:</p> <p>9 Q Mr. Volk is the safety person that was out</p> <p>10 on the job site, correct?</p> <p>11 A He was.</p> <p>12 Q His opinion is contrary to yours that it's</p> <p>13 the obligation of the site safety person to review</p> <p>14 the owners manual for the Hydromobile, correct?</p> <p>15 A Correct.</p> <p>16 Q Do you disagree on page 82 and 83 of Don</p> <p>17 Volk's deposition where he says that if Cory Hanson</p> <p>18 did not comply with enforcing safety for the</p> <p>19 scaffolding he violated E 385 and the users manual.</p> <p>20 Do you agree with that?</p> <p>21 MR. DAVIDSON: Object to form and</p> <p>22 foundation.</p> <p>23 MR. CUDNEY: Join.</p> <p>24 THE WITNESS: Do you mind if I read the</p> <p>25 actual -- I've got a note here in my outline.</p>

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<p style="text-align: right;">Page 114</p> <p>1 BY MR. BENNER: 2 Q I brought it. 3 A I thought you would. I have no reason to 4 disagree with Mr. Volk right there, I have no 5 disagreement with him. 6 Q Would you agree that when Ronnie Dancer 7 placed the planks back he thought he had replaced 8 the working surface? 9 A I would presume that once he put those 10 back in place he believed he had established a safe 11 working surface. 12 Q Would you agree under that situation, once 13 you've laid the planks down and you believe you've 14 established a safe working surface that you don't 15 need to be wearing your fall protection system? 16 A He was in the process of doing this 17 raising, from what I understand, I believe, in 18 reviewing the manual that when it's being raised I 19 believe you're supposed to have your fall protection 20 on, I believe. He was in the process -- if he had 21 completed the whole process of this raising and 22 replacement of the planking I believe at that point 23 he probably would not need his fall projection. 24 Q Thank you. I want to go back to your 25 opinions for a second.</p>	<p style="text-align: right;">Page 116</p> <p>1 once? 2 A Yeah. It varies from manager to manager. 3 I would say anywhere from once to twice a day. When 4 I was overseeing work I usually would try to walk in 5 the morning and once in the afternoon, it would 6 depend on my paperwork load. 7 Q Falls from 6 feet are a general recognized 8 hazard, right? 9 MR. DAVIDSON: Objection; asked and 10 answered. 11 THE WITNESS: In the world of construction 12 they are, yes. 13 BY MR. BENNER: 14 Q Okay, thank you. Do you sit on some 15 committee for OSHA? 16 A No, I don't. 17 Q What certifications do you have, if any? 18 A In terms of what? 19 Q OSHA, start with OSHA. 20 A I'm not certified. OSHA calls it 21 "authorized" to train 10 and 30, that would be 22 OSHA 10 and OSHA 30 which is on my CV. It's called 23 the "OSHA 500." They don't let you call it a 24 certification, they're very picky about that. Of 25 course, my license, my engineering licenses.</p>
<p style="text-align: right;">Page 115</p> <p>1 MR. CUDNEY: For the record, I'm going to 2 have one myself, which we'll need to get. 3 (Exhibit No. 7 marked for 4 identification.) 5 BY MR. BENNER: 6 Q Can you just identify what Exhibit Number 7 seven is. 8 A The owners manual cover and excerpt of 9 pages 6 and 74, and that would be the Hydromobile 10 manual. 11 Q In your opinion, number four, you've got, 12 "There should have been safety nets." Correct? 13 A I'm just saying, yeah, I've got it right 14 here. I'm saying he didn't have a form of fall 15 protection, correct, safety nets being one of the 16 options for that. 17 Q Which rule provides for a safety net? 18 A Which rule? 19 Q Yes. 20 A It's not that it provides, but it requires 21 it. It's one of the options you're given under the 22 basic fall protection rules for eliminating a fall 23 hazard. 24 Q How many times a day do you think the site 25 safety person should walk the job site, more than</p>	<p style="text-align: right;">Page 117</p> <p>1 Q You're authorized to teach OSHA 30 and 2 OSHA 10? 3 A For construction, correct; for 4 construction rules so I can't teach the 1910, just 5 the 1926. 6 Q Why can't you teach the 1910? 7 A General industry is a different set of 8 standards, different parts of our industry, 9 factories, those kinds of things where it's 10 construction or construction rules. Depends on 11 which training you've had and experience. 12 Q Did you regularly teach? 13 A No, I don't. I wish I had time for it but 14 I don't. 15 Q When is the last time you taught a OSHA 10 16 or 30? 17 A Never. 18 Q When did you receive authorization from 19 OSHA to teach a 10 or a 30? 20 A I think it was 2010, I believe. 21 Q How do you get that authorization? 22 A What's required is you have to have been a 23 safety -- five years of safety oversight experience, 24 you have to have taken the OSHA 500, the piece 25 that's the actual lesson work that you can do, you</p>

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1 can do part of it on like -- it's computer based.  
2 With all that you are allowed to sit  
3 for this OSHA 500 training. It's a one-week course  
4 where you actually -- we the students did all the  
5 training. We split Part 1926 up. One day I was  
6 teaching demolition scaffolds and the next day Fred  
7 over there was teaching another part.  
8 So they really gear you up. It's  
9 dual purpose: One, you're getting some  
10 instructional experience; number two is you're  
11 getting all this good stuff out of Part 1926 and  
12 about the OSHA Act itself. That's how you get the  
13 OSHA 500, it's a relatively new -- it's been around  
14 for I think less than ten years.  
15 Q Is there an actual test for the 500?  
16 A Yes, there is.  
17 Q By computer?  
18 A No, in that one week class I mentioned,  
19 the last day of that course, the last hour you're  
20 given a test that you've got to achieve a 70 percent  
21 to get your authorization.  
22 Q You actually had a test, unlike Cory  
23 Hanson, correct?  
24 A We had a test; we did, yeah.  
25 Q Cory Hanson didn't have a test, correct?

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1 A Is that a question for me?  
2 Q Yeah.  
3 A Based on the testimony, he did not.  
4 Q You agree safety starts at the top, that  
5 would be the general contractor and the site safety  
6 person?  
7 A Well, in this case in the Army, it's  
8 probably like the Navy, it would start with the  
9 owner, with the Army and yes.  
10 Q You agree that the contract that Better  
11 Built signed with Corps of Engineers, where the  
12 Corps, in the contract, said they do not have site  
13 safety responsibility, correct?  
14 A Correct.  
15 Q So it doesn't start with the owner, it  
16 starts with the general contractor, that being  
17 Better Built and Clark, correct?  
18 A Correct.  
19 Q Would you agree it's an unsafe condition  
20 for the job site not to have a qualified site safety  
21 person on the Fort Custer job, specifically Cory  
22 Hanson?  
23 A Well, that's a good question. I'm sure  
24 you're sitting there thinking, he's got to answer  
25 this one.

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1 Q Truthfully.  
2 A Oh, it will be. What's important, the  
3 Army and the joint venture, I think in this case, in  
4 my opinion, were running a pretty safe job. In  
5 terms of the requirements that were being pushed  
6 down the chain from the joint venture to the subs  
7 like Leidal, who they had identified all their  
8 hazardous operations, they had their AHAs in place,  
9 there were tool box meetings going on, there was  
10 orientation going on.  
11 So I'm not sure if Cory Hanson's  
12 credentials played that heavily on what was going on  
13 at the site and definitely, in my opinion, didn't  
14 cause Mr. Dancer's accident.  
15 Q What orientation are you talking about?  
16 A The two-hour orientation that would be  
17 given upon arrival on the site.  
18 Q Did you read Tammie Waterman's deposition?  
19 A I read her deposition that was full of --  
20 I know I read Cory Hanson's also. His comment was:  
21 If they were on my site I taught them that they were  
22 in orientation. And there other -- there was more  
23 testimony to that as well.  
24 Q Tammie Waterman's deposition says that the  
25 orientation consisted of them reading a front and

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1 back page, correct?  
2 A I don't recall that.  
3 Q What's the purpose of the manual on the  
4 site safety health person on the qualifications if  
5 it doesn't matter under EM 385?  
6 MR. DAVIDSON: Object to form and  
7 foundation.  
8 MR. CUDNEY: Join.  
9 THE WITNESS: If what doesn't matter?  
10 BY MR. BENNER:  
11 Q That he doesn't qualify. Have you read  
12 Tammie Waterman's deposition where she said Cory  
13 Hanson would walk the job site maybe once a week?  
14 A I read her deposition. I just answered  
15 that question a couple minutes ago.  
16 Q Did you read part where she said --  
17 A I read all of her deposition.  
18 Q Do you think that's adequate if that's a  
19 true statement by Tammie Waterman that he only  
20 walked the job site once a week, that's a good  
21 safety person?  
22 A No, I think once a week would be  
23 inappropriate.  
24 Q Did you read Jim Schaibly's deposition  
25 where he said that Cory Hanson only walked the job

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Tom Destafney  
May 20, 2014

<p style="text-align: right;">Page 122</p> <p>1 site approximately once a week?</p> <p>2 A I did read his deposition, yes.</p> <p>3 Q Assuming that Jim Schaibly is telling the</p> <p>4 truth, walking the job site once a week for the</p> <p>5 safety guy is not appropriate, right?</p> <p>6 A Once a week would not be sufficient.</p> <p>7 Q That would be an unsafe site safety</p> <p>8 person, correct?</p> <p>9 A It wouldn't necessarily mean that safety</p> <p>10 wasn't going on on the site, I would say though,</p> <p>11 that Mr. Hanson wouldn't be fulfilling his role as a</p> <p>12 safety manager, correct.</p> <p>13 Q Wouldn't you agree that having the same</p> <p>14 person do the same job as the superintendent and as</p> <p>15 the site safety person is not safe procedure under</p> <p>16 the contract?</p> <p>17 A Contractually it would not be, correct.</p> <p>18 Q And having the second person on the job</p> <p>19 site, do you believe that Robert Dowding was a</p> <p>20 qualified site safety person?</p> <p>21 MR. DAVIDSON: Objection; asked and</p> <p>22 answered.</p> <p>23 MR. CUDNEY: Join.</p> <p>24 THE WITNESS: I think Mr. Dowding, I never</p> <p>25 saw that he had his OSHA 10 or and OSHA 30. He</p>	<p style="text-align: right;">Page 124</p> <p>1 Q Did you read about his experience of 40 to</p> <p>2 50 years on job sites?</p> <p>3 A Yeah.</p> <p>4 Q His Master's Degree in Engineering?</p> <p>5 A I'm not trying to minimize Mr. Wright's</p> <p>6 credentials. I'm speaking specifically to this</p> <p>7 system.</p> <p>8 MR. BENNER: I don't have any other</p> <p>9 questions. Thanks.</p> <p>10 (The deposition was concluded at</p> <p>11 1:23 p.m.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 123</p> <p>1 didn't have the requisite number of years of</p> <p>2 experience so technically he didn't meet, as</p> <p>3 did Mr. Hanson, didn't meet the letter of the</p> <p>4 law in terms of what was required.</p> <p>5 BY MR. BENNER:</p> <p>6 Q Do you believe there was adequate tie-off</p> <p>7 places for Ronnie Dancer on the scaffold?</p> <p>8 A Was there adequate -- I'm sorry?</p> <p>9 Q Tie-off positions.</p> <p>10 A In the owners manual there are tie-off</p> <p>11 preengineered anchorages, if you will, for fall</p> <p>12 protection up there. They actually show those in</p> <p>13 the manual where those are located. I believe there</p> <p>14 were, yes, I have no reason to believe there wasn't.</p> <p>15 Q You would disagree with Mike Wright</p> <p>16 relative to the adequacies of the tie-off positions?</p> <p>17 A Yeah. I don't know, has Mike Write ever</p> <p>18 been up on one of these? I don't know what</p> <p>19 Mr. Wright's credentials are for making that -- I</p> <p>20 don't know, has he been out and inspected one of</p> <p>21 these? If he's been on one and he's tried it</p> <p>22 himself and he said that I think it would have some</p> <p>23 credibility with me but otherwise I don't have any</p> <p>24 reason to believe that there's not adequate tie-off</p> <p>25 on these platforms.</p>	<p style="text-align: right;">Page 125</p> <p>1 CERTIFICATE</p> <p>2 STATE OF MICHIGAN</p> <p>3 COUNTY OF OAKLAND</p> <p>4</p> <p>5 I, Cynthia Montgomery, a Notary Public in and</p> <p>6 for the above county and state, do hereby certify</p> <p>7 that this deposition was taken before me at the time</p> <p>8 and place hereinbefore set forth; that the witness</p> <p>9 was by me first duly sworn to testify to the truth;</p> <p>10 that this is a true, full and correct transcript of</p> <p>11 my stenographic notes so taken; and that I am not</p> <p>12 related, nor of counsel to either party, nor</p> <p>13 interested in the event of this cause.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21  </p> <p>22 CYNTHIA A. MONTGOMERY, 6437</p> <p>23 Notary Public</p> <p>24 Oakland County, Michigan</p> <p>25 My commission expires 12-10-19</p>

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